

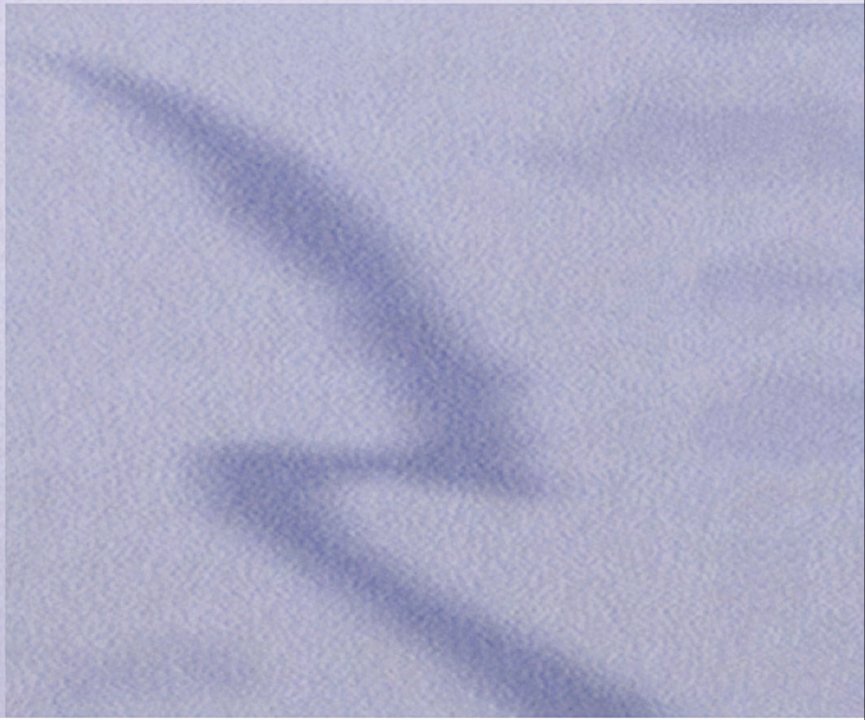
# **Globalization, Governmentality and Global Politics**

Regulation for the rest of us?

Ronnie D. Lipschutz  
with James K. Rowe

RIPE series in Global Political Economy

 **Routledge**  
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# Globalization, Governmentality and Global Politics

This book examines the problem of social and environmental regulation, and the protection of human rights under the conditions of globalization. With detailed case studies on the clothing industry, forestry and corporate responsibility, Ronnie Lipschutz analyzes both the issues and problems that have given rise to various movements and campaigns, and the challenges these movements now face. He critically evaluates the effectiveness of such non-governmental organizations and examines the theoretical implications of these new forms of social regulation for politics, citizenship and the state. Lipschutz concludes that only through the creation of substantive democratic polities can global social problems be addressed.

This major new work provides expert answers and poses tough new questions for the global community. It will be essential reading for students, researchers and activists studying globalization, civil society, citizenship and human rights.

**Ronnie D.Lipschutz** is Professor of Politics and Co-Director of the Center for Global, International and Regional Studies at the University of California, Santa Cruz. **James K.Rowe** is a Ph.D. candidate in Politics at UC-Santa Cruz.

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*Ronnie D.Lipschutz with  
James K.Rowe*



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**To the memory of John Twomey (1965–2003)**

*Le premier qui, ayant enclos un terrain, s'avisa de dire: Ceci est à moi, et trouva des gens assez simples pour le croire, fut le vrai fondateur de la société civile. Que de crimes, de guerres, de meurtres, que de misères et d'horreurs n'eût point épargnés au genre humain celui qui, arrachant les pieux ou comblant le fossé, eût crié à ses semblables: Gardez-vous d'écouter cet imposteur; vous êtes perdus, si vous oubliez que les fruits sont à tous, et que la terre n'est à personne.*

(The first Man, who, after enclosing a Piece of Ground, took it into his Head to say, *This is mine*, and found People simple enough to believe him, was the true Founder of civil Society. How many Crimes, how many Wars, how many Murders, how many Misfortunes and Horrors, would that Man have saved the Human Species, who pulling up the Stakes or filling up the Ditches should have cried to his Fellows: Be sure not to listen to this Impostor; you are lost, if you forget that the Fruits of the Earth belong equally to us all, and the Earth itself to nobody!)

Jean Jacques Rousseau (1754)<sup>1</sup>

*Discours sur l'Origine et le Fondement de l'Inégalité Parmi les Hommes*, "Among Mankind—Second Part," p. 97, at:  
<http://www.geocities.com/paris/chateau/6110/rousseau10.htm> (accessed 20 August 2004).

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## Series preface

We live, it is often claimed, in a globalized world. This basic “fact of life” commands our attention in many different ways, but few are as important as the consideration of its impact on our “politics.” Does globalization empower or disempower, enable or disable, orient or disorient? Does it make us more or less “governable”? Does it expand or shrink our horizons; our identities; our inter-subjective mentalities? These are the political questions that the tools of political economy—conceived of in a humanistic, interpretive and progressive manner—allow us to confront and explore, precisely because their answers speak to how we are able to make choices and fashion the relations by which we are able to live and work and play in a world marked out and distinguished by a social order called advanced global capitalism.

In *Globalization, Governability and Global Politics: Regulation for the rest of us?*, Ronnie Lipschutz challenges us to move beyond the “states” and “markets” paradigm that still dominates much of international political economy to consider a form of politics that directly confronts the political question of how people are able to participate in the social choices that condition the making of everyday life. Led by such an expansive vision of politics, he sets out to explore how people, acting through different organs of political life, are trying to re-instill a more legitimate meaning of the “political” into actually existing political relations that span local, national, regional and global levels. Lipschutz refuses to accept what he calls the hegemonic discourse of the market—or “politics via markets” as he calls it—as the principal answer to the question of what constitutes the “political.” Instead, by drawing on scholarship ranging from Foucault to Arendt, and by exploring a series of case studies including the apparel industry, forestry regulation and the debate over corporate social responsibility, he fashions an argument that equates political activity itself with the “political.” To achieve an expansive, progressive and democratic politics we must act, but to do this we must first refuse the equation of markets with politics that marks out one of the central political planks of globalization as currently practised.

The Routledge/RIPE Series in Global Political Economy seeks to publish innovative and cutting edge scholarship that pushes forward our understanding of how the world is organized, why it is developing in particular directions, and how globalizing tendencies across a range of social relations are reinforcing or undermining these changes. Three important intellectual strands have permeated many of its titles: a curiosity and determination to bring together new and different literatures that offer the promise of better understanding how power and authority are organized within the global political economy; a focus on issues broadly associated with globalization and governance as key elements of such power and authority; and a concern with the way in which today’s global political economy is changing and thereby forcing us to adapt our conceptual frameworks to take account of the changing nature of politics and political economy in a global context.

This volume exemplifies our mandate. It closely examines how societies around the world are responding to global economic pressures in terms of local efforts to govern and regulate global capitalism. The established terrain over which governance and regulation occur no longer seem adequate spaces within which to organize social protection and resistance; hence the call for a new politics of action. Where that action occurs, and through which kinds of agencies, is Lipschutz's central concern. And crucially, he does not call for an abandonment of the state in the face of global capitalism; rather he issues a call to reclaim it for a politics that speaks directly to our everyday life. It is for this reason that *Globalization, Governmentality and Global Politics* will be of interest to a wide readership across the social sciences, and why we are pleased to include it in the series.

Louise Amoore, University of Newcastle upon Tyne, UK

Randall Germain, Carleton University, Canada  
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This book is dedicated to the memory of John Twomey who arrived at UCSC in 2001 as a member of the Politics Department's second cohort of graduate students. He would have been a collaborator and contributor to this project. John was a brilliant, warm, and serious student. Only excellent people have the privilege of being humble, and John was both. He is missed very much.

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Ronnie D.Lipschutz  
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# 1

## Between governmentality and global politics

### Introduction

In recent years, the annual gatherings of Western political leaders, global corporate executives, and international financial institutions have not been complete without a crowd in the streets and a parallel conference down the road. Seattle, Geneva, Gothenburg, Genoa: these are all familiar city names, each conjuring up images of protestors and policy, of banners and broken windows, even of injury and death. Until the events of September 11, 2001, politics in the streets was coming to be seen as the greatest challenge to the forward march of global economic integration; some even warned that, if allowed to continue, opposition to the high politics of capitalism might cause the entire edifice to collapse (Notes from Nowhere 2003; Soros 2000). Since the attacks on New York and Washington, DC in September 2001, the so-called anti-globalization movement, renamed by its supporters the “global justice movement,” has been more subdued, perhaps fearful of being tagged as “terrorists” of one sort or another (e.g. Coulter 2003; Hannity 2004). Even so, the issues and problems that motivated the emergence of this movement—human rights violations, environmental destruction, unhealthy working conditions, child labor, violence against women, concern about genetically modified organisms, all of the appurtenances of what Ulrich Beck (1992) has called “the risk society”—have not disappeared. Economic recession and American wars notwithstanding, the workings of globalized capitalism continue to generate these offenses against people, against real live human beings.

On closer inspection, the protests that have attracted the lion’s share of media attention are only the visible tip of what might be characterized as a much larger social “iceberg,” a form of “transnational politics” based on activists stepping in where states and capital fear to tread. A growing number of nongovernmental organizations, social movements, lobbying groups, and even business associations and corporations—what I have called “global civil society” (Lipschutz 1992/93, 1996)—are “crossing” political, cultural, institutional, and territorial borders in an effort to globalize social activism. They are devising and implementing corporate codes of conduct, frameworks, and other rule-based arrangements designed to foster “corporate social responsibility” (CSR) and to fill the regulatory gaps left by governments unwilling or unable to engage in public policy and social regulation (Haufler 2001; Jenkins *et al.* 2002). In doing this, global civil society actors are not only intruding into what has long been considered the prerogative of sovereign states—international diplomacy and law—but are also transgressing into what has been considered the special preserves of scientists, lawyers, and technical experts—regulation and standard-setting (Braithwaite and Drahos 2000).

Thus, as we shall see in later chapters, the Forestry Stewardship Council has become a global leader in creating regulatory standards for sustainable forestry. UNITE, a garment workers trade union, has been targeting manufacturers whose clothing has been produced under sweatshop conditions. The International Organization for Standardization has formulated a set of environmental standards—ISO-14000—to which corporations can subscribe. There are hundreds, if not thousands, of other similar projects underway, all seeking to smooth down the rougher edges of what seems to be a largely self-regulating global capitalist system (Polanyi 2001; Hardt and Negri 2000). This book is about those issues and problems, the movements and campaigns to which they have given rise and the politics (or lack thereof) of such campaigns, and their intrusion into what have been seen traditionally as the zealously patrolled political spaces of states.

A second theme of this book addresses the tension between politics and markets that arises out of these regulatory campaigns and the corporate responses to them. The global justice movement is often depicted as a knee-jerk, misinformed and Luddite response to the inevitable and necessary economic and social changes of global scale and scope associated with capitalism (Thomas Friedman 1999; for convenience, I shall call these changes “globalization,” and define the term more carefully in Chapter 2). Such changes, it is frequently argued, are necessary if the world—and especially its impoverished regions—is to become more prosperous and its people happier and better off (Bhagwati 2002, 2004). Some disruption and reorganization of social relations are inevitable and necessary as part of this process. Moreover, resistance is both irresponsible and futile, for the alternative—which is never clearly specified—is too awful to contemplate (a common comparison is the sequence of the 1930s and World War II). The world’s poor require succor, and opposition by the global justice movement, as well as the unwarranted regulatory activities of activist campaigners, now stand as a “political” obstacle to improvements in the condition of the poor. Whether or not this view is correct, it is blind to the dynamics of both globalization and consequent social action as they play out on both the global and local stages. Moreover, the stylized setting up of this opposition between “markets” and “politics” obscures an interesting contradiction which convention tends to obscure. As we shall see, later in this chapter and this book, the tricks and tools relied on by both sides largely eschew politics in favor of market-based mechanisms in order to influence and manipulate producer behaviors and consumer preferences. What appears, at first glance, to be “political” is hardly that at all.

In using the term “politics” and “political,” I draw, in part, on Sheldon Wolin’s (1996) nomenclature.<sup>1</sup> I do not refer here to the institutionalized procedures of liberal democracy, the rather undemocratic modes of decisionmaking found in international forums, or the behaviors of corporations in respect to their commodity production chains. I mean, rather, something more fundamental, involving the direct participation of people in those social choices having to do with the conditions and making of their own lives, individually and collectively (Arendt 1958; Mouffe 2000; see below and Chapter 8, where I distinguish between *distributive* and *constitutive* politics). To be sure, there is much in the way of procedural and managerial debate and contestation within and among countries as well as internationally among interested and concerned individuals and groups. But virtually all of these “politics” have come to be focused on the distributive consequences of contemporary global market conditions and forces under neoliberalism, that is, in Harold Laswell’s (1936) classical definition, as being “about who gets what,

when, and how.” Most really existing political systems are not about politics in the democratic and expansive sense I propose in this book. Many do not even offer as much in the way of politics as Laswell’s phrase would suggest.

Indeed, even the contemporary democracies of the Anglo-American and European type are highly structured, stand-off representative arrangements, run mostly by unelected agencies, whose legitimacy is maintained through only a few basic modes of regulated participation. One involves the periodic casting of votes for one of a limited number of candidates or choices (better than pre—1989 socialism or Baathist practice, perhaps, but still quite constrained). Another joins together like-minded individuals who seek fulfillment of their self-interests through various forms of lobbying and public education (forms of collective behavior sometimes viewed as a “threat” to representative democracy; see Huntington 1981). The *demos*, as it were, has scant chance to engage in any kind of direct participation in or, for that matter, deliberation about representative arrangements, about the issues debated in legislatures, or about the outcomes that result from the actions of their representatives. These were all decided long ago and are not to be revisited. Moreover, if some part of the *demos* should seek to gain political voice through direct action or participation, as seems to be the case with the global justice movement, it is regarded as a rabble, a mob, and a threat to social stability (e.g. Latour 1999: ch. 7).

The very *legitimacy* of a democratic system depends, nonetheless, on the widely held conviction that its arrangements are representative, that representation takes place through essentially fair and equitable mechanisms open to broad participation, and that those elected do a fair and impartial job of representing those who did cast their vote, those who voted for other candidates, and those who could not be bothered to go to the polls (Habermas 1975). The claim that each of these principles is fulfilled by really existing democracies is questionable and rightfully under challenge by the global justice movement and others (left, right, center, and out in front). If “politics” is present *within* democratic states only in a pale, washedout form, how much less is it in evidence *among* states, in international forums and activities, where representative links are highly attenuated and capital has been gaining an ever-stronger hand? It is this lack of legitimacy, and the absence of the *political*, that are being protested by the global justice movement and addressed by campaigns for global social policy and regulation.

A third focus of this book thus concerns the perennial question: “What are we to do?” Most analyses of global problematics offer important critical insights into causes and consequences, as well as policies for addressing them, but they rarely take on the normative task of devising a political project. In the final chapter of this book, I attempt to frame such a project. I argue that, before we can “do” anything, we need first to recognize what has gone missing as a result of globalization and map out a restoration of the political, in a thick, participatory sense. How might we restore the political, a small-d democratic politics, not only to global movements but to everyday life? How might we generate a practical process that restores the political not only to the formulation of social policy but also to other activities, especially when governments seem reluctant, and indeed fearful, of doing so? How can we embark on what David Harvey (2000: ch. 9) has called a “dialectical utopia” rather than continue to imagine or fantasize about ideal worlds that, in the face of contemporary reality, appear unachievable?

The dictum that “all politics is local,” attributed to the late Massachusetts Congressman Thomas P. “Tip” O’Neill, seems especially apposite here. Under conditions of globalization, as we shall see, it might be extended to read “and all local politics is global, too.” By this, I mean to emphasize that the distributive politics of the global political economy has reached into almost all corners of everyday life, exercising a governmental power in which the average person has little voice or freedom. Drawing on Michel Foucault’s work on governmentality (1980), I suggest that what is necessary is not the global wielding of the power to influence, to paraphrase Robert Dahl (1957), but, rather, to *produce* power “locally.” To make this possible, a restoration of the political to everyday life, and the “acting” on which it depends (Arendt 1958), is essential. I do not refer here to the politics of liberal democracy and its “town hall” meetings. Nor do I mean the Habermasian politics of discursive democracy (Habermas 1984), which is necessary to but not sufficient for such a project. I do mean something more than the politics of global civil society which (Lipschutz 1992/93), as we shall see, feeds more into modest reforms in the institutional manifestations of globalization than the restructuring that is necessary to a truly political project.

To summarize, this book, then, is about the possibilities of meaningful and effective politics under the conditions of globalized capitalism and the hegemonic discourse of markets offered as the answer to all problematics, large and small. I examine a set of collective responses to these problematics, manifested in the transnational regulatory projects undertaken by activists, corporations, and consumers. I offer a critique of the dominant approach found in these regulatory projects—what I call “politics via markets”—and show why such efforts to regulate the social impacts of globalized capitalism cannot ameliorate, much less eliminate, them. Finally, I examine the possibilities of a global politics whose practitioners are schooled in local politics based on the political, philosophical, and practical cross-fertilization among locally situated but socially diverse epistemes.

An “episteme,” as I use the term in this book, is something akin to the “networks of knowledge and practice” about which I have written in earlier works (e.g. Lipschutz with Mayer 1996; see also Ruggie 1975, who draws on Foucault).<sup>2</sup> Here, it refers to groups of people who are active in “face-to-face” settings that constitute political community (Arendt 1958) but informed and motivated by what might be understood as a common set of normative views, principles, and goals. Most of the epistemes with which we are familiar—even those that may seem radical by conventional standards, such as some variants of environmentalism (Lipschutz 2003: ch. 2)—are Western, liberal, and economic. There are nevertheless any number that do not fall into these categories yet are activist, democratic, and materialistic, oriented toward *nomos*<sup>3</sup> rather than *demos*. Such epistemes have a great deal to offer to contemporary politics and political possibilities, but must be listened to on their own terms. I do not write here of a merging of epistemes, or the colonization of one by another. Rather, I refer to a process of cross-fertilization between different approaches to and views of politics, resulting in a praxis that does not collapse back into the state—although I do not, here, dispense with the state as many might wish to do. I believe that the state will not and must not disappear, although it must be reconstituted and reconstructed. To engage in a truly democratic and active politics, I argue, we must develop a politics that is sensitive to local settings, that is respectful of local agents, and that is aware of the place of the global in the local.

### The new global political economy of regulation

This book began its life as a study of civil society projects intended to develop and deploy social and environmental regulations in what are largely un- or underregulated international settings (Chapter 2). Such projects are the focus of Chapters 4 through 6. They are the work of private and semi-governmental groups and organizations based in global civil society (discussed in Chapter 3) and include:

- activist campaigns to embarrass and cajole corporate producers into self-regulation via codes of conduct;
- organizations whose goal is the promulgation of processing and production standards for goods and commodities;
- movements to sanction international trade in certain goods and commodities in order to constrain violence and human rights abuses in particular countries; and
- corporations, corporate associations, and programs seeking to institute “corporate social responsibility” in production and sales of various types of goods and commodities (examples of such projects can be found in Table 1.1).

Why are such regulatory activities deemed necessary, and why are they taking place now? Why are these campaigns so focused on modifying the behavior of producers and consumers? Why don’t those who are concerned about social and environmental conditions focus on changing political regulation in those countries where these problems have emerged?

Some degree of regulation is generally demanded by producers and capitalists, who believe that a “level playing field” and a high degree of legal certainty are

*Table 1.1* Examples of private international regulation

<i>Type of regulatory campaign</i>	<i>Focus of regulatory campaign</i>	<i>Example of groups involved</i>
Activist	Labor standards in apparel companies’ contractor factories	UNITE Clean Clothes
Standard-setting	Management of sustainable forests and lumber production	Forestry Stewardship Council, Int’l Organisation for Standardisation
Boycotts	Goods from countries violating human and labor rights	Ethical Trading Initiative, Fatal Transactions
Social responsibility	Corporate management	Business for Social Responsibility, As You Sow

essential for economic success. For smaller businesses, regulation may also provide some protection against predatory and monopolistic behavior by larger ones. But “too much” regulation is strongly resisted in the view that it imposes excessive and unfair costs on capital. Consumers tend to demand regulation because they believe it protects them from unscrupulous and rapacious producers and provides safeguards against dangerous activities and products. (Whether regulation actually does such things is not, at this point, of concern, although I do address this question later in this book.) Finally, governments demand regulation—notwith-standing neo-liberal and libertarian rhetoric—in the hope



that other governments and actors will act in a predictable, rule-based manner (this hope is at the core of regime theory; Krasner 1982).

It is useful, in this context, to distinguish between “constitutive” rules and regulations, which organize and structure markets, and “distributive” (or instrumental) rules and regulations, which govern behavior between parties within markets (Lipschutz with Mayer 1996:36). Conventionally—or, at least, according to standard theories—regulation develops for two reasons.<sup>4</sup> First, markets do not emerge “naturally” out of some human propensity to barter and exchange. They are social institutions, based on constitutive “rules of the game,” which develop over time or are created by authoritative bodies. Such rules legitimize markets’ existence and instill normative discipline in those who engage in exchange within them according to distributive rules. Many of the constitutive or structural rules are rarely questioned or examined, but some, such as property rights, are legislated or reified as “natural law.” Such rules do establish the certainty demanded in situations of decentralized exchange, such as markets, but they can also limit the potential for change and flexibility.

Second, many economic activities impose social costs on the general public that accrue to its detriment or generate unjustified benefits to certain private parties. This tendency is sometimes described as “privatization of benefits, socialization of costs.” As explained in Chapter 2, I have borrowed the term “externality” from neo-classical economics to describe such benefits and costs, although other terms and discourses, such as “risk” or even “human rights violations,” have also been applied to the phenomenon of unpaid social costs.<sup>5</sup> The creation and existence of externalities are often couched in terms of “market failure,” that is, the failure of markets to include the costs of things that cannot be commodified or valued. Market failure can be remedied, according to the conventional wisdom, by including social costs in the price of a good, but this is not as easy as it sounds.

It is not always evident, moreover, that markets have “failed.” It may be, instead, that they have been organized with the intention of socializing certain costs and realizing private benefits, as is the case when, for example, pension rights are eliminated in the name of “efficiency.” Indeed, under capitalism the very organization of states and markets, as well as the division between that which is “public” and that which is “private” (Wood 1995: ch. 1), is the result of constant struggles over socialization and privatization, often between classes, leading to what we call “political economy.” Political efforts to minimize social costs to capital in order to maximize private profits take the form of active support for those rules that provide maximum freedom for business to maneuver and active opposition to those rules that seek to impose constraints. This is only a very general observation, however, because the precise desires and activities of any particular business or industry in this regard are a function of how they see their specific operating environment and how they assess both threats and interests within it.

Nevertheless, regulation has been frequently judged necessary to reduce or eliminate externalities, both environmental and social, which otherwise provide undeserved private benefits to producers. These and other forms of regulation have historically emerged through institutionalized political processes *within* states, especially when it has become glaringly apparent that self-regulation is inadequate or non-existent (Polanyi 2001). Whether regulations are too lax or too heavy, or what form they take, is not at issue here;

it is the existence of mechanisms to legislate and regulate at the *national* level that is important. Moreover, the ability and right to demand such controls, have them implemented, and achieve some degree of distributive justice are critical to system legitimacy. There are, by contrast, no standardized *international* procedures for promulgating or enforcing such regulations. But by contrast with the myth of the absent sovereign, international rules and regulations are being formulated and implemented all the time, through a broad range of states, international organizations, regimes, and agencies (this is often called “global governance” or, alternatively, “global governmentality”; see also Vogel 1996). Each rule maker or rule-making forum does so in a fairly idiosyncratic fashion and rarely with consideration of or in consultation with others. Some of these rules and regulations have the force of international law, and are meant to be implemented through domestic legislation and enforced by domestic authorities (as in the case of Codex Alimentarius, which establishes international standards for foodstuffs). Others are administrative tools, whose application is primarily functional and sectorally limited (as in the case, for example, of commercial aviation, telecommunications frequencies or geosynchronous satellite slots). A third category involves limits or prohibitions on certain types of national activities or legislation (resulting, for instance, from the dispute resolution process of the World Trade Organization or the rather weak oversight of the International Atomic Energy Agency).

But note carefully: *None of these rule- and regulation-making forums has acquired authority through a fully legitimated, participatory or representative system.* They are representative of states, and not people. This “gap” is sometimes called the “democratic deficit” (e.g. Underhill and Zhang 2003), although it seems likely that even an operational global democracy would require the types of constraints on the practices of politics as to be virtually indistinguishable from what now exists internationally. What happens nowadays in lieu of a truly representative process is the pushing and hauling of states, organizations, and lobbies, focused on the ersatz legislative arenas that constitute the basis for the existing system of international regulation. The links between these rule-making arenas and local, national, and global (if such can be imagined) polities are quite feeble. Delegations to international conferences and UN assemblies represent governments in power, and arrive at meetings with fixed orders from their capitals. And even though larger delegations may include members of opposition parties, corporate associations, nongovernmental organizations, and scientific institutions, participants are enjoined to support those orders. Delegates thus speak and act on behalf of their governments’ positions, whether those are representative of the national polity or not.

A number of international organizations, such as the World Trade Organization (WTO) and the International Monetary Fund (IMF), do appear to possess high degrees of autonomy, low levels of transparency, limited accountability to political authorities, and almost no responsibility to put things to rights when they go wrong. This may be largely an illusion. As Louis Pauly (1997: x) has written in his book, *Who Elected the Bankers?:*

Most fundamentally, the integration of the world’s capital markets throws into question the way in which raw political power is transformed into legitimate authority. Today, that transformation is accomplished by structure and processes that we associate with the state. The further financial integration proceeds, however, the more it becomes apparent that

truly global capital markets pose a threat to the legitimacy of the state itself.

Pauly makes clear in his analysis of the autonomy and authority of the IMF that the political foundations of capital markets, and actors within them, are to be found in the states that quite intentionally have designed and contributed to the architecture of the international financial system. At the same time, however, those states find it expedient to maintain an appearance of institutional autonomy. Once the rules governing markets and institutional practices are put into place and accepted as the basis for their functioning, the responsible parties need intervene directly only as events warrant (as in, for example, the Mexican peso crisis of 1994 or the Asian financial crisis of 1997–98). For the rest of the time, states remain “behind the curtain” while their creations follow orders and mesmerize those attempting to determine responsibility and culpability for the consequences of those orders.

The WTO offers the archetypal exemplar of such control. It was created in 1995 on the foundations provided by the half-century of operations of the General Agreement on Trade and Tariffs (GATT). The WTO not only absorbed the GATT but was also assigned new tasks as well as some formerly dealt with by other international organizations (Braithwaite and Drahos 2000; Drahos with Braithwaite 2003). Whereas the GATT was based primarily on bilateral trade treaties between states, and the principle of “Most Favored Nation” (MFN), binding only countries that signed agreements with each other, the WTO is multilateral to the core: any treaty (or “round,” as it is called in tradespeak) is binding on all members. This is no different from any other international law, except that the WTO has been granted certain judicial and police powers by its masters: it is empowered to convene trade dispute resolution panels that can pass judgments on the legality of domestic laws that apply to international trade and the production of goods entering such trade. The authorizing rules permitting such actions are embedded in the international treaty that established the WTO and, by the terms of the agreement, they are binding on all members, including the United States, Europe, and Japan. In several instances, trade dispute resolution panels of the WTO have found American or European laws and practices illegal, permitting the wronged state to impose tariffs on imports from the transgressor (Alter 2003). For better or worse, the effect of such WTO directives is to undermine the legislative judgments of the offending state, a move that appears transparently undemocratic. It also suggests that the WTO possesses much greater autonomy than is the case. Broadly speaking, the structure of the WTO favors rich countries and transnational corporations, and why not? They have played the major role in setting up the rules under which the organization operates. Most of the time, therefore, there is no need to look behind the curtain; the WTO follows the wishes of its operators. It is the infrequent exceptions that suggest it possesses both autonomy and power and turn it into a target of protesters.

The course of globalization never runs smooth. Even during the unprecedented Clinton Boom, from 1993 to 2000, when so many people and countries appeared to be doing well by stock markets and global trade, there were those for whom globalization was costly and even disastrous (Chen and Ravallion 2000; Galbraith *et al.* 2002). For such individuals and states, there was little comfort in the nostrums offered by neo-liberal economists, that the judgments of organizations such as the WTO were the price of the

efficient redeployment of capital. Some time hence—Paul Krugman (1994) once suggested in 50 years—today’s nasty medicine would result in robust economic health, greater productivity, and global prosperity. Pain now in exchange for a bright and happy future—or as Joe Hill’s folk song, “The Preacher and the Slave,” would have it, “Pie in the sky by and by.”

In the interim, to whom could those in pain turn for redress? Although there are markets everywhere, and innumerable actors exchanging every conceivable item in those markets, it seems as though no one is in charge. There is no institution or individual responsible for the social costs, externalities, and risks imposed so unfairly on the weak, the poor, the unrepresented. Governments claim, whether it is true or not, that markets are in control and they must obey their strictures. Corporate executives argue that, although they are all in favor of social responsibility, their first responsibility is to shareholders. International agencies protest that they are only following the dictates of their members who, in turn, claim they must obey international law. Buck-passing is the order of the day—nothing needs to be done because everything is copacetic!

That is why the WTO, the IMF, and the World Bank, among others, have become the prime targets of the global justice movement and other activists. Certainly, they seem each to have a major hand in controlling global trade, finance, and capital flows. Yet, this is more than a little illusory, as suggested above. For, not only are the WTO and its “sisters in capitalism” effectively tools of the most powerful of its member states—whose governments themselves do not always agree on what constitutes desirable policy and practice—but a growing fraction of international trade, it is now acknowledged, takes place not *among* countries but *within* multinational firms and their networks (Clausing 2000). The WTO is, at best, a symbol of both the distancing of the global economy from any sort of politics and the loss of institutional legitimacy that has followed from that distancing.

At least one tendency in the global justice movement argues that legitimacy cannot be restored; only the elimination of capitalism will return “politics to the people” (see e.g. Notes from Nowhere 2003). But capitalism has proved to be much more resilient than any of its challengers—which have mostly disappeared<sup>6</sup>—and how it might be destroyed without bringing down industrial society, too, is difficult to imagine (not that the exercise ought not to be contemplated or even undertaken). Others believe that reform is both desirable and possible: if the remit of international institutions is expanded to incorporate problem areas such as human rights and the environment, and these institutions are given the power to pass judgment on violations and punish violators, then the will of the people will be served even if these are not democratic decisions and generate no near-term benefits. The recent histories of institutions that have sought to do this, such as the World Bank’s program to incorporate environmental considerations into project evaluation and support, suggest that such reform might not be the answer, either (e.g. Fox and Brown 1998).

### Governance without government?

This “gap” between the structuring of the political economy and the failure to address the resulting costs has led to what I have called the “new international division of regulatory labor,” which *private* regulatory initiatives seek to fill (Haufler 2001; Hall and Biersteker 2002). Much of the global civil society-based activity alluded to above, and some of which is described in this book, can be seen as an attempt to create political legitimacy in the contemporary global market order through the creation of non-state regulatory frameworks. The goal of these regulatory projects is the creation of some sort of transmission belt between “the people”—here represented by activists and nongovernmental organizations, whose representativeness is often challenged by states and business—and the apparently autonomous and uncontrolled international and transnational institutions, both governmental and corporate, of global capitalism. As suggested earlier, and as we shall see later in this book, the projects examined in this book tend to favor “market-based” regulatory tools and eschew what are pejoratively called “command and control” rules, a term surely intended to evoke the centrally planned economy and totalitarianism of the old Soviet Union. This is unfair. While command and control regulations may fall short in terms of economic “efficiency,” they do reflect *politics*, however tainted it might be by lobbying, special interests and influence-peddling, that generates legitimacy through representation, accountability, and responsibility.

It is a commonplace to bemoan rule by bureaucrats, in Washington and Brussels, who regulate and administer without ever having to face the electorate. But bureaucrats are, at least, notionally bound to observe some version of a common good (Brands 1999), and that common good reflects more than just the judgments of markets—so long as the bureaucrats have not been captured by market logic or forces. Once a decision has been made to “let markets do it,” what remain are mere technical details best handled by “experts,” through what Ulrich Beck (1992:183–236) and Tim Luke (1999:10–16) call “subpolitics.” Thus, under contemporary conditions of globalization, it would seem, the most promising mechanisms for communicating demands and eliminating the democratic deficit are to be found in the market itself! There is some logic to this point: if international institutions are driven by the desires of states and capital to foster economic prosperity, what is more likely to capture the attention of all than a threat to that prosperity?

But defining a common good requires the political, and not just cents. Some social movement groups are trying to inject or infuse political “wedges” into the ranks of globalized elites (as personified, for example, by Thomas Friedman and Paul Krugman, both pundits for the *New York Times*), thereby disrupting that coalition, creating fear that the project might collapse, and forcing reform or retrenchment. The cautious backtracking on globalization by George Soros (2000), the international speculator, and even within the World Bank and IMF (Stiglitz 2002), demonstrates that this strategy has some legs. Others are seeking to reorganize the process of decisionmaking by bringing in those who have lost their voice. The term “stakeholder” is often applied to such efforts in order to suggest that those who are affected by institutional decisions, but lack any direct

role in their making, do possess some kind of “property right” in the matter. Stakeholders are frequently told that their views and concerns are important: they are listened to and taken into account (Kelly *et al* 1997; but see also Minford 1998). What this means in practice is less clear and, when a crunch comes, stakeholders are the first to be discounted. They are, in fact, the equivalent of unsecured creditors in a corporate bankruptcy, lucky to receive even a few cents on every dollar notionally owed to them.

In an attempt to buttress the claims and standing of those unrepresented in high-level decisionmaking, a growing body of theoretical and empirical literature seeks to examine and critique the relationship between “the people” and mechanisms of global governance, surveillance, and policing (Foucault 1991; Dean 1999; Gill 2003). Such studies include exploration of how existing categories of individuals, and their roles in society and its institutions, are being changed and disrupted by the relentless pressures of globalization (Beck 2000; Brown 2003). Discussions and debates over human rights, group identity, cosmopolitan democracy, global civil society, post-national citizenship, and so on, all represent attempts to use existing concepts and practices to describe the new relationships between individuals, states, and markets (Brysk and Shafir 2004). In other words, if a way can be found to re-instantiate the widely accepted, historically contingent relationships between citizen and state, and state and market, characteristic of a rather limited 200-year period beginning around 1750 and ending some time after 1950, perhaps relations of legitimate global governance and politics can also be forged anew (Lipschutz 1999, 2004a).

This seems implausible to me. The search for new relationships between people, states, and markets is not likely to succeed as a result of a retooling of old categories, any more than an analog record player could produce something intelligible from a digital CD. External forms may appear similar—discs turning round and round—but things are quite different inside. Elaborating on the forms and practices of existing representative systems or extending them to the global level will only generate even paler versions of what are already rather weak democratic systems (Held 1995; Chandler 2003). And such approaches fail to come to grips with the disappearance of politics from the scene, what others have called “the end of ideology” (Bell 1960) or “the last man” (Fukuyama 1992).

Paradoxically, perhaps, attempts to construct new forms of “citizenship” or belonging as a means of addressing the democratic deficit also smack of market ideology. The primary concerns of many of those who theorize in this vein seem to center on three points. First, are the members of society getting their “fair share” under globalization? Second, are the members of society being permitted to “be themselves” under globalization? And, third, are the members of society being represented within their country of residence under globalization? The first question has to do with the fate of the social safety net and people’s access to those entitlements increasingly deemed too costly for society and a burden on national competitiveness. The second question has to do with recognition of individualism and identity in a liberal system that prizes the former above all else but has managed to turn “identity” into a consumer fetish that can be put on and taken off at will. And the third question has to do mostly with the implications of permitting non-members, through access to the vote and basic human rights, to alter the terms of distribution within a society. In all three instances, the core issues are consumption and distribution in a market system, and not the constitutive politics of

participation or the goals of society. *Today, under globalization, there are no politics of any great significance. There are only markets masquerading as politics.*

In trumpeting the “end of history,” Francis Fukuyama (1992) eagerly anticipated this very outcome (as had Daniel Bell a generation earlier). They, and others, thought that the triumph of liberalism would bring stability and order to human affairs, leaving only issues of management to be decided by experts. What has happened, instead, is the triumph of market ideology, with decisions of world import being left to the vagaries of interest rates and what Thomas Friedman, mixing metaphors poorly, calls the “electronic herd” (1999). The resulting fetishistic colonization of society is comparable with any totalitarianism the world has thrown up (Lipschutz 2001a; Dawson 2003:153–4; McMurtry 2002). And it is in this totalitarian sense that *governmentality* has come to be the dominant, if not sole, mode of global rule.

### **Governmentality without politics**

Governmentality, as Michel Foucault puts it, “has as its purpose not the action of government itself, but the welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health, etc.” (1991:100; see also Dean 1999: ch. 1). More specifically, Foucault (2003a:244) writes, “By this word [governmentality] I mean”:

The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principle form of knowledge political economy, and as its essential technical means apparatuses of security.

The tendency that, over a long period and throughout the West, has steadily led toward the preeminence over all other forms (sovereignty, discipline, and so on) of this type of power—which may be termed “government”—resulting on the one hand, *in the formation of a whole series of specific governmental apparatuses*, and, on the other, in the development of a whole complex of knowledges [my emphasis].

Governmentality is, in other words, about *management* and *regulation*, about ensuring and maintaining the “right disposition of things” being governed and ruled (Foucault 2003a: 235). *Political economy* involves the regulation of behavioral norms; *security*, the methods through which this regulation is articulated. And, lest this somehow appear to speak of the state asserting its control of and domination over society, in another essay, “The Birth of Biopolitics,” Foucault (2003b: 204) suggests that “Instead of making the distinction between state and civil society into a historical universal that allows us to examine all the concrete systems, we can try to see it as a form of schematization characteristic of a particular technology of government.”

The current “War on Terrorism” can be seen, in this light, as a form of governmentality under the direction of Washington, DC. The agents and institutions of counter-terrorism seek to impose a particular order on unruly populations, especially

those found in so-called rogue and failed states but also in the more disciplined industrialized states. Behavior is managed, on the one hand, through the structuring of political economy so as to provide appropriate incentives and disincentives to the members of these populations. On the other hand, where the capillaries of political economy are weak or non-existent, rules and practices of security provide both warnings of high voltage and shocks to those who choose to ignore the signs. Although it is only a tiny minority of these populations that requires more than normal management, selecting out those oppositionists for punishment and disposition requires that all populations be managed (Lipschutz, 2002). After all, if you have done nothing wrong, you have nothing to fear.

“Global governance” can thus come to be seen as a variant on such technologies of governmentality. Political economy and security are articulated not only through states and their societies but also via the myriad of governmental and international agencies, public and private associations, and even the world’s many thousands of nongovernmental organizations and corporations, each of which has its own set of governmental norms and security techniques to ensure the right disposition of things. This is not to say that all of these agents operate in a coherent fashion, in terms of either activities or objectives; we are not speaking here of the perfectly aligned photons found in a beam of laser light. They are, however, directed toward the normative project of what Kanishka Jayasuriya (2001) and others (Gill 1995, 2003) have described as the global “economic constitutionalism,” associated with neo-liberal globalization. As Jayasuriya puts it, “Economic constitutionalism refers to the attempt to treat the market as a constitutional order with its own rules, procedures, and institutions that operate to protect the market order from political interference” (2001:452). This “constitution,” reflective primarily of the normative principles of US governmentality, and embedded in the rules and procedures of international financial institutions, relies on surveillance, self-discipline, and security for its adoption and internalization. The result is the effort to manage and reform, carried on through what I call “politics via markets.”

Governmentality poses its own set of conceptual difficulties where power, agency, and structure are concerned, yet Foucault’s notion alerts us to the complexities and nuances of rule and rules under a liberal order (Onuf 1989; Dean 1999). When considering the issue of power, in particular, what normally attracts the greatest scholarly and public attention is the overt display, or “first face,” of power, in the form of military force, economic sanctions, threats, coercion, and direct manipulation (Barnett and Duvall 2005). Such exercises indicate the failure of the normal power relations of liberalism (Arendt 1958), which are so naturalized through internalization that they are virtually invisible. Actors behave according to the tenets of “normality,” and thereby produce and reproduce both their identities *and* the “normal” conditions under which such behavior takes place. Sovereignty, in the traditional sense, disappears, to be replaced by governmental management. It is in this sense, as Foucault puts it (1980:109–33), that we are the products of power circulating through society in capillary fashion. As I will argue in later chapters, however, Foucault’s insight can also be used to think about ways to reassert forms of political sovereignty, albeit at levels and in realms other than the national or global.

Under conditions of globalization, therefore, power is generally not exercised in an overt or quantifiable form, and governmentality does not rely heavily on the visible



exercise of power. Instead, order is maintained through self-disciplining and self-regulation, on the one hand, and the disciplining function of surveillance and law, on the other. Power is manifest primarily through hegemonic discourses that naturalize normality. It is only when this normality is disrupted or resisted that more instrumental forms of power—force, coercion, influence—appear. The September 11, 2001 attacks on New York and Washington, DC constituted a disruption of the global regime associated with neo-liberal governmentality; the responses by the US government in Afghanistan and Iraq involved resort to more direct forms of power, inasmuch as neither self-discipline nor external discipline were considered adequate to constrain and contain organizations such as Al Qaeda or the regime of Saddam Hussein (Lipschutz 2000: ch. 7, 2002).

Foucault wrote only of national governmentality, with each separate (state) order constituting its own sphere of discipline. As we shall see, the extension of his idea to the international arena is rather straightforward (indeed, there have been incipient forms of governmentality among states for centuries). What is most provocative and thought-provoking about the application of governmentality to contemporary social orders is that it does not stand as a “theoretical” alternative to realism, liberalism, radicalism, or constructivism, or fall prey to the false dichotomies drawn between and among those theories. Global governmentality is an empirical phenomenon whose specific features are determined by contingency and context, and which may fit one or more of the conventional theoretical framings of international relations that, themselves, are the products of power as deployed in particular spaces at particular times. As I will argue in this book, the phenomenon of “politics via markets” is an artifact of the specific form of governmentality we find today in global politics, that is, neo-liberal governmentality (Dean 1999: ch. 8).

Foucault’s concept of governmentality helps to highlight two critical points relevant to my story about global social regulation. First, global civil society (GCS) is almost fully internalized within the system of governmentality that constitutes and subjectifies it, yet which GCS presumes to contest, regulate, and modify through its projects. Agency is, thus, highly constrained (Dean 1999:165). Quite evidently, the arrangement of rules, regulations, and practices characteristic of contemporary bureaucratic capitalist states does not and cannot address more than a fraction of the “welfare of the population.” Much of the remainder of this function is provided, increasingly, through civil society. That is to say, the activities of civil society associations and organizations serve to stabilize and normalize the decentralized and often local conditions of the liberal political economy that are seen as threats or disturbances to the welfare of human populations (i.e. these are “externalities”). The precise methods of accomplishing these ends are often highly contested, but the overall objective is the same. In this sense, much of what appears to be opposition—by civil society, social movements, etc.—is better understood as integral to governmentality.<sup>7</sup>

Second, if politics is even possible under global governmentality, it must take place in some “social space” within that system. Here, I would propose that it is a space in which “face-to-face” action is possible. Often, this is a local space, in the sense of proximity, but it need not be tied to a specific place. What is crucial is the *practice* of a politics (preferably democratic) in what might be called, following Arendt (1958), the “spaces of appearance.” Such practice is not based on Habermas’s (1984) model of rational

discourse: discussion and debate are important, of course. Rather, it is in the *acting* that power becomes productive, the political becomes possible and continuous, and politics becomes meaningful (Mouffe 2000). But note carefully: no one can know what is lacking in (democratic) politics and the political without engaging in them. The task before us therefore becomes identification of both the political and the space(s) in which it can and does happen.

### What are we to do?

As any number of commentators have noted, under conditions of globalization rules are often promulgated at the international level but deployment remains within the purview and jurisdiction of the state (Braithwaite and Drahos 2000; Gill 2003). States are expected to legislate domestically the laws to which they have agreed in international forums and to see that they are implemented and enforced domestically. There is, of course, little in the way to ensure that the last two steps of this procedure will be followed and, in fact, no great expectation that they will be. For the most part, when international sanctions of one sort or another are imposed on states that have been judged to be in violation of international law, governments decide whether the costs of disobedience are acceptable or too high, and respond accordingly. Thus, a state that has signed and ratified those International Labour Organization (ILO) conventions addressing workers' rights of free association is under no serious international compulsion to fulfill the terms of these conventions, and certainly is not expected to assist actively in their fulfillment. But we then bemoan the ineffectiveness of the ILO (and many other international agencies), as though this were the organization's fault.

Under these circumstances, those who believe there is merit in active domestic fulfillment of international law seem to be reduced to two basic strategies. Strategy One is to induce those who are subject to the laws in question to live up to the terms of those laws. Thus, for example, corporations that operate factories in which workers' rights are routinely violated may be pressured, via various market mechanisms, to obey those rules and laws. Strategy Two is to work within a domestic political context, toward effective and active state implementation and enforcement of relevant laws. There is no reason, of course, that both strategies cannot be pursued in common but, as I shall make clear in later chapters, the first approach appears to be today's strategy of choice, inasmuch as the individual exercise of one's consumer preferences offers the comforting illusion of influence over corporate behavior. If enough people decide to boycott company X, it is often said, that company will have to change its policies and practices if it wants to stay in business (Taylor and Scharlin 2004). By comparison, the political struggle implied by Strategy Two looks time-consuming and unpleasant, without any promise of success (Chaloupka 2003). So, markets it is.

Is this so terrible? Politics, it must be admitted, have come to be seen as a realm of corruption, double-dealing, and personal enrichment. Politicians, of whatever stripe, are regarded as wholly self-interested, power-seeking individuals with no conception of, much less regard for, a common good. Governments are routinely purged in the hope that a new regime will be an improvement, but there is little empirical evidence to suggest that this is more than empty faith. As a result, social movements, nongovernmental

organizations, and corporations—civil society, in other words—have come to be seen as the “last, best hope” by those intent on providing public governance in pursuit of the common good and help for those in need. Such a hope might not be entirely in vain, but those holding it tend to overlook the relationship between civil society, state, and market and the role that politics and the political *must* play in shaping and constraining markets.

Indeed, the state is central to such shaping and constraining. As Robert Boyer and Daniel Drache (1996:11) put it,

The idea that markets have multiple, continuous and contradictory effects, and hence are unstable structures and subject to the constant need for organization and reorganization, is due to the fact that they emerge out of social relationships.... [M]arkets are like open-ended social spaces constantly subjected to spontaneous counter-movements by producers, consumers, owners, workers and government threatened by the price system's rapacious excesses. When the price system does not work *ex mirabilis*, society must rely on the state to find ways to stabilize it and the larger economy.

Without some kind of structuring form or limits, markets quickly degenerate into an economic “state of nature.” Boyer points out that, in the absence of monetary and legal systems, both of which are imposed by some kind of authority, “any market will collapse due to the spreading of opportunistic behavior among traders” (1996:101). In democratic market systems, in particular, civil society is the source of the ethics that underpin the specific form of and limits on markets, and its members expect the state to follow its dictates in this regard (not that this always happens). That is why the activities of civil society, if they are to have any effect on the conditions of concern, must be directed towards the state rather than the market. It is in this context, too, that the restoration of the political to everyday life becomes critical, not because it can create miracles but because it can show us what is missing from our everyday lives.

### **Where do we go from here?**

The first part of this book, Chapters 2 and 3, addresses the demand for global social regulation and the conundrum of “politics via markets.” Chapter 2 offers a general discussion of the growing demand for global social regulation, and the various campaigns and projects that have developed in response to that demand. I argue that one key aspect that is generally ignored in both praise for and attacks on globalization is the social reorganization that is generated as capital is redeployed in new modes of production. This reorganization disrupts those systems of rules and regulations that have reined in the more egregious behaviors and impacts resulting from unfettered markets, leading to a host of externalities that are to the benefit of capital and to the cost of almost everyone and everything else. It is these externalities that global social regulation is meant to address, even though there are precious few mechanisms for promulgating and enforcing such rules and laws, and a good deal of resistance even to those.

Chapter 3 examines the ways in which politics, understood in more conventional terms, has been displaced by markets, which are deemed to offer more efficient and less troublesome solutions to distributive conflicts. While there is nothing especially new or innovative about this displacement—it was, after all, one of the primary objectives of the Bretton Woods system (Ruggie 1982, 1991, 1995)—globalization has increased this gap in two ways. As both policies and practices have been raised to the international level, the “transmission belt” between citizens and international decisionmaking has become ever longer and more tenuous. Decisions made tend to favor those who have the gold, and not necessarily those who might wish to have a say. And, as the political distance becomes ever larger, there has been a turn to the market as a means of effecting supposedly political outcomes. Thus, rather than trying to regulate offensive corporate activities through direct compulsion, there is a growing belief that consumer pressure applied through markets can foster self-regulation without any recourse to the state.

Markets are particularly weak arenas in which to seek political goals. While some argue that there is such a thing as “private” political power (e.g. Cutler, Haufler, and Porters 1999), which can be accumulated through the market, this seems a somewhat oxymoronic concept. Politics and the political are, by definition, a public, collective endeavor, while markets involve private exchange between actors. Politics and the political are based on collective, agential power, which markets eschew. And market-based politics rests primarily on attempts to alter the preferences of large numbers of consumers in order to put pressure on producers. Because consumer preferences are not political and are strongly influenced, if not determined, by the very system of production and consumption that motivates the social disruption and externalities of concern, there is a certain tautological process evident here. If capital is able to acquire political power, it is more a form of displacement than an alternative: the “corporate citizen” becomes, in a sense, a franchisee able to cast a vote using its dollars.

The second part of the book, Chapters 4 to 6, examines global regulation in three issue areas: the apparel industry, sustainable forestry, and “socially responsible” business. The apparel industry offers an archetype of private regulation. The major apparel companies—Nike, the Gap, C&A, and others—are all based in North America and Europe, although most of their lines are produced in Latin America, Asia, and Eastern Europe, where labor costs are appreciably lower and labor regulation is appreciably weaker. Few of the majors own their own factories; most sign production deals with subcontractors, who are motivated to keep costs to a minimum. The result has been a proliferation of sweatshops, and the return of sweatshops to the United States (Bonacich and Appelbaum 2000). In this instance, activist campaigns and corporate codes of conduct are designed to influence consumer choice as a means of threatening corporate profit margins (which are quite large); companies, it is believed, will seek to improve working conditions and enhance labor rights so as to avoid negative publicity, consumer revolts, and, perhaps, a movement by governments towards more effective regulation.

There is, for the moment, no international forestry law, although this is not for want of trying. The protection and maintenance of forests—especially old-growth ones—would seem to be a job for those governments within whose jurisdiction they are found. Yet here, as in many other sectors, the global competition for market share motivates states to license logging in a way that generates maximum revenues. Popular forces—when they exist—are hardly a match for self-interested elites and capital, who have legislatures

safely in their pockets. The sustainable forestry movement is a transnational response to this problem. It seeks to develop performance codes for timber companies, whose lumber will receive appropriate labels if their practices meet the standards. Consumers will, it is hoped, favor those companies whose products bear the seal of approval. To date, there is a growing number of such seals and rather limited evidence indicating success.

Finally, the global movement for “corporate social responsibility” has become something of a rage. After news about corporate malfeasance began to break in the United States during the fall of 2001, President George Bush announced that trust was fundamental to the success of the free enterprise system, telling Wall Street that “there is no capitalism without conscience; there is no wealth without character” (Bush 2002). In this, he was giving voice to two ideas: first, that the market relied on actors to behave in an appropriate fashion; second, that actors had to police themselves in order to be good. In *The Theory of Moral Sentiments*, published some 15 years before *The Wealth of Nations*, Adam Smith (1859: Part III, ch. I) argued that moral behavior was essential to the success of capitalism. He, however, relied on the disciplining power of Christianity to limit people’s appetites, and never reckoned with a secular society. Nowadays, markets resemble more closely the neo-realist world of Kenneth Waltz (rather than the other way around, as Waltz had it; 1979), and, as both Hans Morgenthau (1948) and George Kennan (1951) made clear, there is no room for moral behavior in a dangerous world.

But the corporate responsibility movement is less a response to the entreaties of the American President than a form of protection against the aggressive campaigns of global civil society. Fearing that codes of good practice might be imposed by public authorities, and desirous of not being made subject to activist demands, a growing number of corporations have formulated their own codes of conduct and regulation. These have been supplemented by various types of performance standards formulated by private bodies such as the International Organization for Standardization (ISO) as well as notions of “corporate citizenship” proposed by both governments and private groups. Finally, as we shall see in Chapter 6, the United Nations has also gotten into the game, with its “Global Compact,” a set of principles and a program intended to enlist capital in the task of global governance and public financing.

The third part of the book, Chapters 7 and 8, analyzes critically the approaches taken by campaigners in these, and other, issue areas, and offers an assessment of what is missing from them, and what needs to be put in place. The core problem, I argue in Chapter 7, has as much to do with the effects of this rupture in politics on “citizens” as it does with questions of distribution and access to entitlements or the proper behavior of corporate actors. To a growing degree, the subject of democratic politics has become the object of what I have called “totalitarian markets” (Lipschutz 2001a). Consumer has replaced citizen; choice in the market has displaced sovereignty in politics. We select our representatives much in the same way as we select cereal or laundry detergent. We have come to believe that, in line with Smith’s argument about the benefits of a division of labor, politics consists of selecting that candidate who is to each one’s greatest advantage in the hope that some kind of “invisible hand” will generate a greater social good. No wonder there is a widespread belief that corporations acting individually, through codes of conduct, can aggregate to better political outcomes without all the fuss and bother of politics.

This is not, of course, an original argument; for generations, if not centuries, people—usually conservatives, in both the old and new senses—have complained about the corrosive social effects of allowing individual appetites to gorge on self-interest (Muller 2002). Their answer has been to return to the “old values,” under which the lower classes were kept in their place and excluded from political participation (McLoughlin 1978). My argument, as laid out in Chapter 7, comes from a different direction: there, I describe how the peculiar relationship between public and private under capitalism (Wood 1995) has led to the “economization” of citizenship and the commodification of human rights, which are then privatized within the commodity chains of transnational capital. This not only undermines the political sphere, but it also destroys the basis for politics.

There are, I think, alternatives to politics via markets. In the final chapter, I make an argument for “bringing politics back in.” Here, I utilize a distinction made by Hegel between morality and ethics. Morality is linked to the individual active in civil society, understood in the Smithian and Marxian senses; ethics is linked to people acting collectively and politically in the Arendtian sense. I also argue, as noted above, for a form of “face-to-face” politics, following Arendt’s (1958:198) argument that

The *polis*, properly speaking, is not the city-state in its physical location; it is the organization of people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be.

Today, although we live in particular places, we “live together” globally, as well. Politics and the political must be reconstituted not simply via the local or the global, but only through the kind of action that builds on the exercise of “productive power” directed toward ethical change, *through the state*—although not necessarily the state as it is today. Nor can politics and the political be short-lived, momentary, or, in Sheldon Wolin’s (1996:31) words, “episodic, rare.” It must be strategic and it must involve constant and continuing struggle (Chaloupka 2003). To some, this will seem exhausting. After all, wouldn’t it be preferable to have a peaceful, comfortable life in which all things are settled? I rather doubt such a life is possible or desirable for, if we give up politics, we give up that which makes us human.

### Notes

- 1 Wolin’s definition of *the political* involves “moments of commonality when, through public deliberations, collective power is used to promote or protect the well-being of the collectivity” (1996:31). As I shall explain in later chapters, I see the political as encompassing more than just “moments.”
- 2 My use of “episteme” should not be confused with “epistemic community,” which is based on common methods of knowing (Haas 1992a, 1992b).
- 3 In constitutional law, *nomos* “entails two sets of social practices, including...the agreement about principles, norms and procedures which guide and regulate politics, and day-to-day interaction in the social, cultural, political, [and] economic contexts ...” (Wiener 2003: i).
- 4 My use of the term “regulation” has nothing to do here with French regulation theory (see e.g. Boyer and Drache 1996; Robles 1994; Boyer and Saillard 2002).

5 As I note in Chapter 2, my use of this term, rather than the more politicized “risk” (Beck 1992), is meant to be both analytical and ironic.

6 Islam may yet prove to be a successful challenger, at least at the cultural level; see Lubeck and Lipschutz 2005.

7 In light of the preceding paragraphs, it is evident that not all social movements and NGOs are necessarily “progressive,” but even those whose programs might be regarded as contrary to biopolitics, such as Al Qaeda, seek to make the world a “better place.” See e.g. Buss and Herman 2003; Lubeck and Lipschutz 2005.





# **Part I**

## **Affluence and effluents**



## 2

# Globalization, externalities, and regulation

The need of a constantly expanding market for its products  
chases the bourgeoisie over the whole surface of the globe.

Marx and Engels, *The Communist Manifesto*

### Introduction

Why have the social and environmental impacts of capitalism's global expansion come to be matters of such widespread public concern? Why have social movements, nongovernmental organizations, business associations and corporations, and even the United Nations taken it upon themselves to seek regulation of these impacts, outside of state-based political, legal, and institutional frameworks? And why have the regulatory projects described in this book come to rely so heavily on market-based mechanisms rather than state-based political ones? While the origins of these impacts are many and complex, a major impetus arises from the global reorganization of capitalist production and consumption that has taken place over the past few decades, a process often called "globalization." On the one hand, there have been major changes in the international division of *labor* associated with where and how commodities are made and services are provided (Boo 2004a, 2004b), as well as a growing geographic dissociation between sites of production and consumption (Mazurek 1999; Princen 2002). On the other hand, there have been corresponding shifts in the international division of *regulation* among international regimes, markets, states, and other actors, as the domestic regulatory arrangements that once addressed the negative social and environmental impacts of production have proved to be inadequate or unavailable (Braithwaite and Drahos 2000). As was generally the case in the past, changes in the division of regulation have lagged far behind those in the division of labor. Both changes are a major focus of this chapter.

In the pages that follow, I address the problem of the social and environmental effects—which I call "externalities"—that have emerged as a result of the globalization of capitalism (defined below), and the various responses to the relative absence of social and environmental regulation at the international level. The second section of this chapter examines the sources and causes of these externalities, which arise from the compulsions associated with capitalist competition for profit under a global neo-liberal system of ideology and practice. In the third section, I address the need and demand for regulations of externalities: why do they arise? The final part of the chapter discusses, at a general level, both activist campaigns and corporate projects that seek to develop and institute private regulatory frameworks. First, however, some definitions.

### Why globalization? Why externalities?

As suggested in Chapter 1, one of the major sources of contemporary social dislocation and environmental degradation, such as labor violations and pollution, is to be found in transformations in the international capitalist system of production, trade, and sale of commodities, manufactured goods, and knowledge over the past two decades. As a system based on accumulation and profit, capitalism, as Marx noted, is never static. But at certain times, massive and large-scale transformations occur in both means and relations of production, based not only on the emergence of new technologies but also on changing patterns of social organization. Since some time during the 1970s, the world has been going through one of these periodic transformations (sometimes this is called the transition from “Fordism” to “post-Fordism”; see Lipschutz 2000: ch. 2; Rupert 1995; Polanyi 2001). This most recent cycle of change is associated with the rise of semiconductor electronics and communications systems, and has come to be called “globalization” (for recent statements on globalization, see e.g. Bhagwati 2004; Pieterse 2004; Scholte 2000; for a contrary view, see Hirst and Thompson 1999).

Globalization is a discourse,<sup>1</sup> simultaneously an *idealist* set of beliefs, a *behavioral* set of principles, rules, and activities, and a *material* set of outcomes and infrastructures. Globalization is *idealist* in the sense that it is reified as a complex process that will make the world richer and happier (Thomas Friedman 1999). It is rationalized and naturalized in the name of “efficiency, competition and profit,” as an inevitable concomitant of the historical triumph of liberalism (Fukuyama 1992). Those who believe, moreover, will surely reap the benefits. Globalization is *behavioral* in the sense that the social reorganization of existing institutions as well as changes compelled in the practices of real, live people alter and disrupt “normal” life (Wood 1995). As a result of these changes, “all that is solid melts into air” (Marx and Engels 1964:63). Finally, it is *material* in the sense that capital, technology, goods, and, to a limited degree, labor are able to move rapidly to areas with high returns on investment, without regard to the social or political impacts on countries, communities, and people (Lipschutz 2000: ch. 2). Moreover, just as earlier industrial revolutions have left their physical traces on the landscape, altering it forever, so, too, has this latest round (see e.g. Cronon 1991). Globalization also has contradictory political effects. It offers numerous opportunities for social movements and other forms of political organization and action (Colás 2002) even as it disrupts existing beliefs, values, behaviors, and social relations (Crawford and Lipschutz 1998). At times, these disruptions can generate violence and even war (Lipschutz 1998).

In historical terms, there is little that is new about these processes or outcomes. The present phase of capitalist expansion is only the latest in a centuries-old trend toward worldwide economic integration but, in combination with the speed and rapid growth of international trade, financial flows, consumption, communication, and travel (Castells 1996, 1997, 1998), it is having, by far, the broadest and deepest impacts yet on the world’s disparate societies (Shaw 2000; Hirst and Thompson 1999). In particular, in terms of the *reorganization* of social relations coupled to changes in relations of production—globalization appears to be having far greater and more far-reaching impacts

than was the case during earlier periods of capitalist expansion. During the current phase of globalization, in particular, as production has become much more complex, with raw materials, commodities, semi-processed materials, parts, and finished goods moving among locales and plants in different countries according to both inter state/inter regional and intrafirm logics of comparative advantage (e.g. Bonacich and Appelbaum 2000: ch. 2; Gereffi 2002), so have relations of production and the impacts on social institutions. The specific forms of these processes, and the paths of corporate and social change, are determined less by the *relative* costs of factors of production, as we would expect from the classical theory of comparative advantage. Rather, those forms are more dependent on factor costs *internal* to the production chain, the costs of capital, financial, human, and intellectual, the burden of social costs imposed in specific locations, and the size of local subsidies, if any (Cameron and Palan 1999). Moreover, not only does this current phase of globalization involve the redeployment of capital and production factors (and, it should be noted, both legal and illegal labor mobility), but it is also very knowledge-intensive. It is knowledge-intensive in terms of the complexity of production, in terms of the commodification of knowledge (Drahos 2003), and in terms of our understanding of globalization's impacts on both social and natural environments (Lipschutz 2003).

As forms and organization of production, exchange, accumulation, commodification, and consumption change, social and environmental consequences follow. There are three notable ones. First, as production is shifted around and reorganized, environmental and social impacts are also relocated, with concomitant effects on health, livelihood, and nature in these new locales (Princen 2002; Lipschutz 2003: ch. 3; Luke 2003; Rowe 2003). Second, changing forms of production, commodification and growth in consumption increase the volume, diversity, and, perhaps, toxicity of the resulting waste stream (Clapp 2001; O'Neill 2000). Finally, the drive to increase efficiency of investment and production results in organizational impacts, as familiar forms of social relations and relations of production are altered or destroyed (Beck 2000). In all three instances, while benefits accrue to producers as well as consumers, costs are imposed on those who are politically and economically powerless and too weak to resist these changes or to organize in response to them. To encapsulate these social and environmental impacts of globalization, I use the term *externality*, derived from neo-classical economics (Coase 1960). I do this for reasons both analytical and ironic, in the former instance because these impacts fit the definition of externality, in the latter because these impacts are often shrugged off as a necessary cost of corporate and national competitiveness in the global economy.

Conventionally speaking, an externality is a cost or benefit that accrues to an activity for which a producer does not pay. Thus, for example, a factory that dumps its untreated pollution into a river enjoys the benefit of not having to pay for waste treatment, while the hazards of the pollution are "externalized" outside the production system and imposed on downstream users, who have no direct means of stopping the pollution (Pearce and Turner 1990: ch. 4). Externalities are often explained in terms of "market failure," which occurs when the price of a good or bad fails to include all costs of production, including social and environmental ones. According to the Coase theorem (1960), those affected by an externality such as pollution should be willing to pay the producer to eliminate the hazard or problem, because that is the most economically efficient means of accomplishing this goal. Consequently, it is assumed that people will pay for precisely as

much pollution reduction as they desire, and no more. This particular solution is not, however, necessarily fair to or healthy for those affected, especially as the costs of amelioration or reduction rise, which is one reason why laws are passed to limit or make illegal such effects.

As a rule, the concept of externality is not one that appears in discussions of international trade, labor conditions, or foreign direct investment. Yet, there is a linkage. Apparel companies (the focus of Chapter 4), whose goods are produced under subcontract in low-wage countries, enjoy a benefit or positive externality in the cost differential they realize by outsourcing manufacturing. These benefits arise in two respects: the wage differential between home and host country; and the lower degree of enforcement of laws regarding wages, working conditions, and labor rights in the host country as compared to the home one (Bonacich and Appelbaum 2000; Rosen 2002). Both serve to increase corporate profits as a result of the growing difference between production costs in the host country and retail prices in the home country.<sup>2</sup> By contrast, the losses or negative externalities are experienced by the workers who receive low wages and labor under unsafe conditions, and the environment which is degraded by more than just pollution. These impacts are, evidently, of only limited concern to producers (see e.g. Klein 2000). Workers, lacking structural power and organization in a highly competitive situation, are compelled by the terms of their employment contract to yield up some part of the value of their labor to capital.<sup>3</sup> (Nature, of course, has no such power at all.) Under conditions of interstate competition, reserve armies of labor, and an absence of enforceable laws, either domestic or international, workers may lose more of their labor value than might otherwise be necessary or fair.<sup>4</sup>

Economists are quick to point out that the costs of social and environmental externalities, and the matter of appropriate wage levels, are more appropriately subsumed under the categories of comparative advantage among countries and market equilibrium within countries. The specific level at which standards and regulations are set and followed is, according to the conventional argument, a function of a state's "cultural preferences" and the market clearing price for labor in the host country (Bhagwati 2004:46–8). Any international attempt to legislate or alter these preferences or to establish wage levels at some more appropriate level constitutes an unwarranted intrusion into national sovereignty and introduces distortions into labor markets. Consequently, the low wages paid to workers in Third World factories are simply a result of the normal functioning of labor supply and demand within and among countries, rather than a subsidy—or positive externality—to First World producers, who realize higher profits, and consumers, who have access to cheaper goods.

Strictly speaking, a conventional externality, such as air pollution, "crosses borders" by leaving its site of production and intruding into the living spaces of others (Pearce and Turner 1990). "Social" externalities, such as I have described them above, have a somewhat different character, inasmuch as their obvious effects are limited to the host country. But social externalities do have several transborder elements: the enhancement of consumer purchasing power in the rich countries through transfer of workers' surplus value between countries, the impetus for workers to emigrate to rich countries as a consequence of employment "push and pull," and the downward pressures on home country wages that result. While these are rationalized under the concept of comparative advantage, it could also be argued that, in particular, the transfer of "value" between

countries should extend only so far as wage differentials correspond to the differing domestic costs of basic goods and purchasing power within the host economies—that is, workers should at least receive a “living wage,” rather than the generally lower market-clearing wage (Stanley 1998; Figart 2004). The extent to which workers are underpaid relative to their income requirements—a level that is, of course, strongly contested—results, therefore, in an unjustified and possibly inefficient benefit to consumers. It also encourages higher consumption rates through lower prices of goods, which generate further externalities through the wastes generated as a result (Princen *et al* 2002).

The contradiction embedded in the neo-classical economic perspective is that any country wishing to maximize its international comparative advantage, whether in labor, raw materials, or environmental regulations, would deliberately set such standards at a very low level in order to undercut its competitors, whatever its national “cultural preferences” might be (this is sometimes called the “pollution haven” hypothesis; see e.g. Mani and Wheeler 1997; Levinson and Taylor 2004). In other words, the requirements of “efficient” participation in the international division of labor mandates that developing countries, many of whom are in competition with each other to acquire and retain foreign investment, minimize the costs of those factors in order to hold a comparative advantage, even though, all else being equal, they would not do this. This conclusion suggests that the choice of low levels of social regulation is imposed exogenously and is not a “cultural preference” at all.

There are, however, countervailing pressures and arguments that address such externalities and their elimination. Under the normative pressures of a still evolving human rights regime (Soysal 1994; Brysk and Shafir 2004), and in fulfillment of their human rights obligations, states are increasingly expected to ensure provision of some minimal standards of civil rights, social welfare, and environmental quality, especially in the working environments of the industrial and agricultural sectors (Braithwaite and Drahos 2000; Taylor and Scharlin 2004). One can argue about whether such labor standards actually fall into the same category as other human rights, and to what degree human rights might constitute a form of Western “cultural imperialism” (Bhagwati 2004). But it is the case that, despite widespread opposition to regulatory harmonization, most of the world’s states have ratified a variety of international conventions, as well as domestic laws, that ostensibly guarantee human rights to their citizens, labor rights to their workers, and protection of their environments. Whatever their actual practices, such endorsement is seen by many as obligating those states to observe and actively ensure those rights (Thomas 2001), and provides a powerful counter to arguments about market efficiency and income growth associated with comparative advantage.

The externalities of concern here are not an inevitable consequence of the reorganization of production and consumption under global capitalism, either. Rather, their appearance results from deliberate and conscious decisions by national governments to downplay impacts and to disregard the embedded and largely obscured capital transfers involved in accepting those impacts. The reasons for this position are not difficult to surmise: the wealthy and powerful tend to benefit from these capital transfers and they have little interest in reducing profits in order to benefit labor or consumers. Most governments seek foreign investment and pay much greater attention to the demands of capital, except in those rare situations in which labor poses a threat to domestic political stability. Indeed, given the rise in attention to “shareholder value” and

the exigencies of competition during the 1990s, corporations would be foolish, on their own and without compulsion, to use their profits to pay for the costs of externalities.

### Why regulate?

But why is regulation necessary in the first place? As mentioned in Chapter 1, regulation of market-based activities and exchange develops for a number of reasons. First, markets do not emerge “naturally.” They are social institutions based on “rules of the game” that serve both to legitimize their existence and instill normative discipline in participants (Boyer and Drache 1996). Some rules are customary or given, but most seem to arise through legislation and administrative action. Moreover, regulation is often desired by both buyers and sellers, consumers and producers, for it is generally argued that a “level playing field” reduces transaction costs and enhances competition. But note that, as collective action theories point out, regulations that provide concentrated benefits to specific parties generally find greater support than those that offer diffuse benefits, while regulations that impose concentrated costs on specific parties are frequently rejected in favor of those that impose diffuse costs on many others (Olson 1965; Stone 1997).

A second reason for regulation, as discussed above, is that often there are social costs of certain activities that accrue to the benefit of some producers and the detriment of the general public, unless some kind of payment is required or some kind of restriction is imposed on the activity that generates the cost. Regulation may also be needed in order to maintain competitiveness and efficiency in markets and avoid the social costs of monopoly. These forms of regulation generally emerge through institutionalized political processes within states, although they are often strongly contested by producers and capital. Whether regulation is too lax or heavy, or what is its particular form, is not at issue here; it is the fact that there exist mechanisms to regulate externalities that is important and, moreover, that the ability to demand such controls and see them legislated and, ideally, implemented is critical to the legitimacy of states and markets.

A third reason for regulation rests on the issue of institutional *legitimacy*. Although the global economic system is not, by any stretch of the imagination, a democracy, there is nonetheless a growing public expectation that it will produce fair outcomes, uncompromised by corruption, favoritism, and violation of the rules. Such violations, when they happen, must be seen less as obstacles to an economy’s smooth operation—indeed, they may be necessary to make markets work well—than for their corrosive effects on public faith in the market (Bush 2002; McMurtry 2002). Both social and environmental externalities, as well as recent egregious cases of corporate malfeasance, have only served to enhance a widely held sense that, perhaps, markets do not benefit everyone to the same degree (Stiglitz 2002; Phillips 2002; Notes from Nowhere 2003). Inasmuch as it is states that are responsible for authorizing the structural rules governing the political economy and markets, any loss of legitimacy of the market reflects on and should be addressed by states. Much of the regulatory activity discussed in this book must be seen, therefore, as an attempt to restore or establish political legitimacy of the contemporary economic system, in the absence of concerted state action, through the creation of some sort of transmission belt between “the people,” organized in civil



society, and the apparently autonomous international and transnational institutions and corporations that seem to some to “run the world” (Korten 1995; Gruber 2000).

### **Dismantling the old (state-based) division of regulatory labor**

Historically—that is to say, over the past century—it was the so-called welfare state that took on the management, control, or elimination of social externalities generated by unregulated and under-regulated economic practices (Polanyi 2001; Hays 1980, 1987; Skocpol 1992; see also Fogel 2000). This had the effect of harmonizing rules and regulations *within* national and subnational jurisdictions (albeit, not without considerable resistance by capital). In recent decades, such responsibilities have been broadened to include environmental impacts and they have been extended into the international realm (Young 1994). Although both social and environmental regulation have always been uneven within countries as well as among them, there has developed widespread public expectation that governments will impose controls necessary to eliminate social and environmental externalities within their jurisdictions. Indeed, since 1970, the growth in the number of national and international environmental and social ministries, institutions, and regulations has been considerable. But there has not been a commensurate expansion of regulatory *authority* in the international realm, even as the apparent need for it has grown (Braithwaite and Drahos 2000).

The environment is one arena in which the externality problem is particularly evident, especially in cases in which activities within one state have impacts on environments within others (something that is the case, for instance, with global climate change). The conventional solution to transboundary problems is cooperation between or among countries, through international regimes that function to monitor and regulate offending activities (see e.g. Young 1994; Haas *et al.* 1993; Keohane and Levy 1996; Kütting 2000). International regulatory regimes are also attractive because they reduce the transaction costs to capital associated with a plethora of different and often conflicting national rules and regulations (and some would add that international organizations are easier to lobby and manipulate than domestic legislatures). But while the negotiators of international environmental regimes have some successes to show, especially in controlling ozone-depleting substances, protecting some endangered species, and reducing transnational flows of some pollutants (Kütting 2000), many negotiations have proven much more difficult to complete.

Furthermore, as economic competitiveness and growth have become more important in the domestic politics of all countries, and diplomacy has become more open and public, the costs of dealing with global social externalities have also come to seem more onerous in domestic terms. Governments are confronted with multiple “constituencies,” both national and international, whose demands must be satisfied if elections are to be won (Evans *et al.* 1993). At home, interest groups apply pressure, both pro and con, on national governments; abroad, various states, regimes, and non-state actors do the same (Leatherman *et al.* 1994; Keck and Sikkink 1998; Smith and Johnston 2002). Policymakers, consequently, seek to conclude deals that will minimize the costs their countries have to pay while maximizing the benefits their constituencies will realize.

Because this particular circle is difficult to square, the result is, quite often, that not much happens.

The apparent internationalization of regulatory authority provides one method of eliminating what is called the “two level game” problem, either by narrowing the space of domestic political contestation or by completely eliminating some issues from domestic political consideration (Ruggie 1982; Barkin 2003). The World Trade Organization, for example, has been endowed with a remarkable degree of autonomy so as to ensure that domestic legislatures (the US Congress in particular) cannot intervene in every trade dispute that might involve their respective countries (Braithwaite and Drahos 2000; Drahos 2003; Alter 2003). It is also possible for governments to seek more attractive forums in which to negotiate for favorable regulations, thereby reducing the salience of even interstate politics (for the particularly interesting case of “forum shopping” with respect to intellectual property rights, see Braithwaite and Drahos 2000; Drahos 2003). By arguing that competitiveness and efficiency require internationally harmonized regulations that are not subject to domestic debate, economists and politicians have convinced most legislatures and publics that international regimes are the most efficient and effective strategy for addressing externalities. These arenas then become the object of “expertise,” whether scientific or administrative, and outside the realm of politics (Beck 1992; Luke 1999).

But recourse to regimes is not uniformly applied to all externalities; some problems are quite deliberately excluded from internationalization out of concern that they might obstruct trade and economic growth. The way in which such exclusion occurs can be seen, in particular, in responses to campaigns to extend international regulation to encompass social matters. Proposals to do so are often strongly opposed by government authorities, corporate officials, and academics (mostly economists), who seem to suggest that supranational rules are acceptable if they involve barter, banking, budget deficits, or borrowing, but inappropriate if environmental protection, human rights, labor standards, or distributive justice are involved (see e.g. Zaelke *et al.* 1993, especially Bhagwati 1993). Indeed, existing international regulatory law does not so much eliminate politics from contentious issue areas as it privileges the desires and goals of transnational capital and national elites (the response of Third World leaders to President Clinton’s suggestion at the Seattle WTO Ministerial that labor and environmental standards be considered by the WTO indicates just how contentious these matters are; see also Judge 2001). By limiting debates to small groups of national representatives and corporate executives, and “letting the free market do it,” most international regulatory arrangements have deliberately been made both opaque and non-democratic as well as quite limited in scope.

International regulation has not always been as public an affair as it is today (indeed, James Scott argues that, even today, much regulation is customary rather than public; see Scott 1998: ch. 1). Historically, major social activities within societies were governed by customs, laws, covenants, and contracts among and between individuals and groups, often but not always with the approval or support of some legitimate public authority (Braithwaite and Drahos 2000). For example, medieval guilds formulated strict rules governing membership and practice, and this form of self-regulation was later carried into the medical and legal professions (which, nevertheless, are only permitted to regulate their members with the explicit authorization of local, provincial, and national governments). Maritime law is an arena in which there has long been and continues to be

a considerable amount of private regulation (Cutler 2003). Another example of private regulation can be found in common pool resource systems, such as those described by Elinor Ostrom (1990) and others (Bromley 1992), in which practices and limits rest with the collective.

The emergence of public—that is, state-based—regulation during the nineteenth century was, as Craig Murphy (1994) has documented, a consequence of the growing marketization and industrialization of European society as well as the increase in long-distance trade and the consolidation of state power. With the bonds of social trust dissolved in the acids of economic exchange, *caveat emptor* and “know thy neighbor” were no longer sufficient guides against fraudulent practices and dangerous products. In many ways, the welfare state represented the apotheosis of public regulation and, although there has been a strong rhetorical commitment in liberal democracies to deregulation since about 1980, it is not so clear that this has actually come about. In many respects, regulation has been quite intentionally transformed and relocated rather than eliminated (Vogel 1996).

In any event, after World War II, most regulation remained national and statesanctioned. There were certain sectors in which international public regulation was instituted, as in the control of the spread of nuclear weapons, the allocation of radio and television frequencies and geosynchronous satellite slots, and so on (Haas 1992b). There were, as well, private organizations that certified the quality and performance of other private organizations, such as the Better Business Bureau, *Good Housekeeping*, the Consumers’ Union in the United States and the Consumers’ Association in the United Kingdom. In a few cases, national regulatory systems were “internationalized” and adopted as the basis for regimes. For example, the safety rules of the US FAA have been generally adopted by all national aviation authorities, although they are not always rigorously followed (US FAA, no date). Domestic public regulation also had the concomitant effect of limiting entry into markets and professions (a story nicely told by Frank Norris in *McTeague*, 1899), and international regulation has had much the same effect in areas such as nuclear weapons development and agricultural trade.<sup>5</sup>

Today, the centralization of regulatory authority in the state appears to be well past its twentieth-century apogee (realized, perhaps, during World War II and the early decades of the Cold War). In particular, in the interests of economic competitiveness and growth, states have been deregulating nationally and reregulating internationally so as to provide more attractive economic environments for capital (Strange 1996; Vogel 1996; Mishra 1999). Strictly speaking, such deand re-regulation is not a new phenomenon, having began in earnest after World War II, with the Bretton Woods institutions (Ruggie 1982, 1991, 1995). But while the power behind this process remains largely state-based, in a number of respects the locus of regulations and enforcement authority has been shifted to international institutions, such the World Trade Organization. This shift has been accompanied, as well, by a change from what are called “command and control” regulations to market-based strategies (see p. 39). There is a growing tendency by some governments to implement policies attuned to a global economy through regulatory harmonization or mutual recognition of national standards (see Chapter 5). This is especially the case in Europe, where candidates for future membership in the European Union are required to write the Union’s environmental and social provisions into new legislation (Wiener 1999).

At the global level, however, regulatory harmonization is restricted largely to those areas in which capital has a direct interest, especially having to do with trade and finance. Certain forms of regulation are particularly important to capital, which demands political stability, low transaction costs, and minimal investment risk. Regulations which facilitate the interstate movement of capital and goods as well as foreign direct investment and, more generally, structure the global political economy in ways supportive of capital and trade are highly desirable, while social rights and regulations—labor rights, education, housing—are regarded as imposing excessive and unjustified costs on capital and trade (Braithwaite and Drahos 2000). Moreover, through structural adjustment programs, governments are often discouraged from seeking to regulate in such issue areas or to fund social welfare costs (McMurtry 2002; Mishra 1999).

Consequently, as social and environmental responsibilities have been shed or abjured by governments, other institutions have sought to provide them, either directly or through non-state regulatory measures. As I have indicated, a growing number of these projects are private or semi-public. Some are transnational, others local or regional, and all are organized by civil society actors, including nongovernmental organizations, social movements, business associations, and corporations (Cutler *et al.* 1999; Cascio *et al.* 1996; Wiener 1999). To put the point another way, two apparently contradictory tendencies can be observed, best understood as an integral part of the dialectic of contemporary globalization. On the one hand, states are becoming the “executive boards of global capital,” doing what is best for business; on the other, authority for social welfare and citizen well-being is being off-loaded, to a considerable extent, on to the private sector. All of this is taking place with the full approval and participation of national governments, aided and abetted by a wide variety of other institutions and actors.

Whether this transfer of responsibility and authority is of net benefit to people around the world is hardly clear, for two reasons. First, the shifting of regulatory responsibilities “upward” into the international arena represents part of the effort to depoliticize government, especially with respect to those matters that might be particularly contentious at the national level (Ruggie 1982; see also p. 39 and Chapter 3). Second, the shifting of other responsibilities “downward” to the local and private levels is tantamount to the state’s shrugging off of any notion of a public good in favor of the “efficiency” of the private sector. The latter case raises serious theoretical questions about the nature of civil society and the extent to which its interests may come into conflict with the public interest (a point to which I return in Chapters 7 and 8).

### **The new transnational division of regulatory labor**

While concerns about the social and organizational externalities generated by globalization and capitalism have been most visible in the demonstrations and protests in Seattle, Boston, Washington, Geneva, Prague, Genoa, Göteborg, and elsewhere, these are only the tip of the new regulatory “iceberg.” In writing specifically about environmental regulation, Errol Meidinger (1999–2000:2) has observed that

Private organizations have recently established numerous programs aimed at improving the environmental performance of industry. Many of the new

programs seek to define and enforce standards for environmental management, and to make it difficult for producers not to participate in them. They claim, explicitly and implicitly, to promote the public interest. They take on functions generally performed by government regulatory programs, and may change or even displace such programs. Private environmental regulatory programs thus have the potential to significantly reshape domestic and inter-national policy institutions by changing the locus, dynamics, and substance of policymaking.

And as suggested by the United Nations' Global Compact and OECD's Guidelines for Multinational Corporations (discussed in Chapter 6) as well as the activities of organizations such as Business for Social Responsibility, growing numbers of corporations and business associations are engaged in similar activities. Indeed, there is a large and growing number of such campaigns underway to promulgate and implement transnational regulatory systems, taking place, for the most part, outside of the framework of existing interstate regimes and institutions. A number are listed in Table 2.1. As will be seen later in this book, these regulatory projects, initiated by various groups, organizations, associations, coalitions, and corporations, operating under the rubric of "global civil society" (Lipschutz with Mayer 1996), can be regarded as an element in a contemporary version of Karl Polanyi's (2001) "double movement," part of an effort to re-establish political authority over self-regulating markets. Regulatory projects initiated through civil society are nothing new, even at the transnational level, but there are reasons to think that we are seeing something of a resurgence, and certainly an expansion, in such efforts. In a sense, these arrangements constitute what I call a "new international division of regulatory labour."<sup>6</sup>

*Table 2.1* Some current global social regulatory campaigns

<i>Issue area</i>	<i>Examples of activist regulatory campaigns</i>
Women's rights	Amnesty International Campaign for Women's Human Rights
Climate	Climate Action Network
Forestry	Forest Stewardship Council; Forest Products Certification
Species diversity	TRAFFIC; Conservation International
Anti-big dams	International Rivers Network; World Commission on Large Dams
Corporate social responsibility	Business for Social Responsibility; As You Sow
Toxics	WWF Global Toxics Initiative; Center for Ethics and Toxics
Anti-GMO	Campaign to Ban Genetically Engineered Foods; Genetic-ID
Organic food	Organic Consumers Organization; IFOAM; Pure Food Campaign
Labor	Campaign for Labor Rights; Maquiladora Health and Safety Network
Tobacco	International Tobacco Control Network; Tobacco Free Initiative
Indigenous rights	Survival International; International Indian Treaty Council
Child soldiers	Coalition to Stop the Use of Child Soldiers
Small arms trade	International Action Network on Small Arms
Land mines	International Campaign to Ban Land Mines
Trade monitoring	Global Trade Watch; Ethical Trading Initiative
Diamonds	Fatal Transactions International Diamond Campaign
AIDS/HIV	Global Strategies for HIV Prevention

Most of these regulatory projects are organized and conducted in a fairly direct manner, pressuring consumers to shop selectively and capital to institute social policies out of corporate self-interest. As mentioned earlier, and illustrated in Chapters 3 and 4, projects are designed to use market-based incentives to alter behavior. We might also argue that these projects are *motivated* by three somewhat different incentives: functional, ethical, and moral. *Functional* projects focus on the effectiveness of outcomes: can particular practices be modified or eliminated? *Ethical* incentives have to do with notions about justice, equity, indigenous rights, biocentrism: can particular groups gain greater access to resources and decisionmaking? Finally, *moral* incentives focus on the simultaneous generation of profits and “good works” resulting from implementation of rules and regulations: can consumers and corporations do well by doing good?

Such regulatory projects are generally characterized as either “public” or “private” (or some mix) in order to distinguish between the traditional role of national governments in guaranteeing property rights and contracts through political means (“command and control”) and efforts to foster forms of self-regulation through the utilization of market mechanisms. This extension of regulatory authority and reach away from the state can be categorized along two dimensions: (1) organizational form and sector (public or private);

and (2) regulatory mechanisms (authority-based or market-based). Table 2.2 summarizes the resulting categories and provides some examples. The “real world” is not, of course, quite so simple, and the examples in the table are not ideal cases. If we look closely at the range of actors involved in the “privatization” of regulatory activities, we find that they run the gamut from wholly public to wholly private—including more conventional interstate organizations that have begun to “bring in” non-state actors—to corporate associations and social movement service providers that have little or nothing to do with political authorities.

- *Interstate regimes* are primarily formal organizations or agreements, or aggregates of organizations and agreements, negotiated and ratified by national governments, that seek to harmonize international standards. Examples of the former are the World Trade Organization and the International Labour Organization; of the latter, the international financial regime (International Monetary Fund, World Bank) and the nuclear control regime (Nuclear Non-

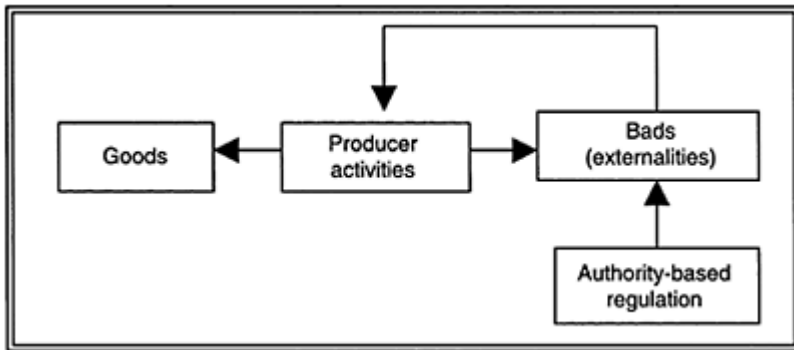
Table 2.2 Institutional forms of global regulation

<i>Political</i>	<i>Economic</i>
<i>Public Interstate</i>	<i>Activist</i>
World Trade Organization; Int'l Labour Organization	Burma boycotts; Int'l Tobacco Control
<i>Private Transnational</i>	<i>Private</i>
Fatal Transactions (war diamonds) Land Mines Convention	Corporate codes of conduct; ISO-14000

Proliferation Treaty, International Atomic Energy Agency). The resulting regulations are expected to be legislated domestically where they will apply to both public and private actors.

- *Transnational regimes* include both public and private entities and organizations, and may, under certain conditions, be transformed into public regimes (e.g. the Land Mines Convention). These regimes are frequently initiated as activist movements and, for defensive reasons, are “adopted” by public agencies and national governments (e.g. Fatal Transactions International Diamond Campaign).
- *Activist regimes* include both public and private entities and organizations, are initiated by activist movements, and are adopted by corporate and public entities. The International Tobacco Control Network and the anti-Burma boycott are examples of such regimes. The latter may be illegal under the terms of the WTO charter.
- *Private regimes* include quasi-nongovernmental organizations (QUANGOs) which, in this context, are organizations with public, semi-public and/or private memberships, charged with state-authorized functions, such as the International Organization for Standardization (ISO). Also involved are non-governmental organizations, coalitions, social groups, and corporate representatives. Regulations are voluntary and intended to apply to corporate activities, in either public or private realms, but are not subject to state vetting or rejection. Some entities offer auditing and certification services to private producers.

It is also helpful here to distinguish between two basic modes of regulation: “authority-based” and “market-based.” Authority-based regulations (Figure 2.1)—sometimes called “command and control” and pejoratively associated with the old socialist economies—order producers to internalize “bads” by placing limits on offending activities or requiring specific performance standards. Such regulations are often cast in the form of “minimize harm,” which tends to disregard the burden of monitoring, sanctioning and enforcement. The result is that rules which impose significant costs on producers may be ignored, avoided, or contested, with concomitant effects. Ineffective outcomes are then blamed on the improper and inefficient allocation of resources while failure is blamed on individual error, deviousness, and self-interest.



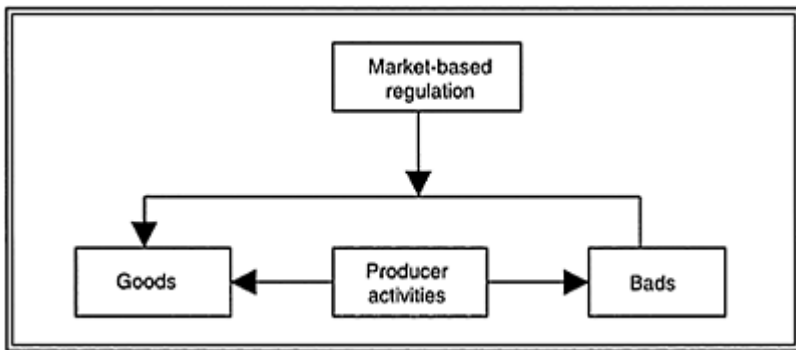
*Figure 2.1* The conventional relationship between function and authority-based regulation.

During the 1970s, a growing debate over the rising costs of regulation fostered the increased use of cost—benefit analysis, a practice formally institutionalized in the United States during the 1980s. Under cost—benefit analysis, the costs of regulation are estimated and compared to the benefits from regulation. If costs exceed benefits, the regulation is deemed inefficient and is unlikely to be implemented, in the view that, on balance, society is better off with the status quo or putting its resources into the reduction of other bads. There is, however, a serious flaw in this approach. Costs are, generally speaking, short-term, well known and concentrated, while benefits can be long-term, difficult to estimate, and diffuse; this is captured in the phrase “privatized benefits, socialized costs.” Moreover, benefits that cannot be monetized, such as environmental services provided by clean water or a lessened need for medical services as a result of safer working conditions, are not included in the calculation. Hence, unless the externality to be regulated is one whose damages are known to be large and near-term, many regulations will fail the cost-benefit test.

During the 1990s, an alternative approach to regulation, utilizing market-based mechanisms such as tradable pollution permits and independent certification, became increasingly popular as a means of internalizing impacts.<sup>7</sup> Cost-benefit analysis merely



examines whether a project is worth doing in dollar terms; it does not motivate producers to seek investment opportunities that might arise from reducing or eliminating externalities. By contrast, market-based regulatory tools take account of the distribution of costs and benefits by shifting the locus of decisionmaking away from political authority to market actors, allowing the consumer to decide how and where to pay the costs of internalization. The theory here is that individual producer investment preferences will maximize each one's individual return, resulting in the greatest aggregate reduction of harm to society as a whole. The markets through which such regulation is effected are generally structured to provide higher returns on investment as a result of the changed behavior than would result from the original behavior or authority-based regulation. Thus, such a regulatory strategy relies on individual self-interest to produce a more efficient allocation of resources and more optimal outcomes. This pattern of regulation is shown in Figure 2.2.



*Figure 2.2* The changing relationship between function and regulation.

What does such market-based regulation look like in practice? The operation of market-based regulation is seen most clearly under the so-called bubble system of air quality. The bubble system treats an entire air basin, or “airshed,” as a single physical unit. A total acceptable pollution level is established by the responsible authority and is converted into emission rates. Emission rates become the basis for the creation of emission permits, entitling the holder to dump a certain volume of pollution into the atmosphere over a specified unit of time. These permits are then allocated to polluters or auctioned to the highest bidders, who can purchase as many permits as necessary. The managers of each pollution source can calculate whether it is less costly to buy emission permits or reduce emissions, and to choose which route to take. The result should be the most efficient allocation of monetary resources and maximization of total reduction (a description of this process with respect to global climate change can be found in Lipschutz 2003: ch. 3).

The logic behind this political chemistry is that, although the air pollution to be reduced originates from point sources such as power plants and factories, and disproportionately affects those living or working near to or downwind from the emissions source, all pollutants tend to mix and mingle across airsheds. (There is also

considerable pollution from diffuse sources, such as cars and furnaces, but these are more difficult to control at the “source” and ought to be reduced at the factory, so to speak, through development of less-polluting devices.) Atmospheric mixing is especially evident in places such as the Los Angeles basin, where circulation is restricted by the surrounding mountain ranges and pollutants tend to accumulate. By treating the airshed as a single unit, regulators assume that the precise location of emission reductions, or the benefits of reduced emissions, do not matter. Instead, even though some might still receive higher exposures, it is the *aggregate* reduction across the airshed that counts for overall health and wellbeing.<sup>8</sup> Hence, so long as the total volume of emissions is reduced, it does not matter which facility does the reduction or where the reduction is located. Thus, plants able to reduce emissions to less than some stipulated level can sell their “unused” emission rights to those for whom the cost of reductions would be greater than the benefits, and enjoy a return on their investment in reduction technology. The end result is that everyone in the airshed enjoys lower pollution levels, at lower cost, than would be the case under an authoritative regulatory system. This, at least, is the theory: the market solves problems.

### **Triumph of the market?**

Although some of the regulatory projects of interest in this book involve public authorities in some limited capacity, most of them fall under the rubric of “private regimes,” using the methods of the market to accomplish their objectives. Private regulatory campaigns involve three forms of market-oriented activity. First, some publicize human and workers’ rights violations in subcontracting plants in order to encourage consumers to boycott specific companies, generate pressure on market share, and embarrass company executives. Second, some campaigns seek to develop certification programs whereby goods produced under acceptable conditions may be labeled to this effect. Finally, some urge companies to adopt and implement “Corporate Codes of Conduct,” which stipulate a set of minimum working conditions that must be met in their own and their subcontractors’ factories (see O’Rourke 2004; Fung *et al.* 2001; Haufler 2001).

What, precisely, are consumers and corporations being asked to do? In the first instance, activists attempt to influence consumer preferences through unfavorable publicity about a company’s production practices. It is assumed here that each individual selects her consumption choices on the basis of self-interest, which may be economic or political. It is also assumed that a consumer exercises moral discretion in making decisions about what she will consume. If consumers can be convinced to boycott products in response to moral appeals, companies face the possibility of a decline in revenues and profits. It does not take a great deal of unfavorable publicity for corporate executives to start worrying about their brand’s reputation, even though there is very limited evidence to suggest that activist campaigns either alter consumer choice or affect the bottom line (see Chapter 4). Given the choice, the consumer will select items produced in accordance with normative standards in preference to those that are lower-cost but produced through unfair exploitation of workers. This selection process, if repeated by a large number of consumers, will induce corporate management to alter its

practices as a form of self-protection. Ultimately, other companies will do the same. Workers' rights will be instituted, even though public authorities have played no role in the process. There will be no need to seek state involvement in the regulatory process.

In the second instance, corporations are pressured to live up to certain generally accepted normative standards, for example to ensure that workers are not overexploited or exposed to dangerous working conditions or made to suffer ill-health from the factory environment. (These, as noted above, are the same standards regarded as being in violation of the "cultural preferences" that underpin comparative advantage.) Codes of conduct specify these standards and stand as a commitment that the company will abide by the standards and ensure that those with whom it does business will do the same. By implication, then, socially conscious consumers will buy products made under the terms of such codes and this will redound to the benefit of the corporation as well as workers and the environment. Again, however, there is almost no empirical evidence to indicate that either of these two outcomes follows from the adoption of a code of conduct, but there might be a certain degree of "ratcheting up" among companies (Fung *et al* 2001; Taylor and Scharlin 2004). As we shall see in Chapter 4, it is not entirely clear that such codes are being followed, anyway.

Note, in particular, that the primary mechanism through which the goals of these projects are to be achieved is not, through enforcement of existing laws in the host country or the promulgation of new, binding regulations, either domestically or internationally. Instead, the incentive rests almost wholly on the implied impacts on a company's market share and its profits. By threatening to reduce market share through changes in consumer preferences, such projects are relying increasingly on economic means to achieve political ends. In this respect, regulatory campaigns can have an impact but, for the most part, only on the targeted corporation and its subcontractors, *within the production and supply chain*. The extension of such social improvements to other companies and labor sectors within host countries is neither inevitable nor, it would appear, even likely. In other words, efforts that do not address the political context within which violations of labor and other social regulations are taking place—that is, within specific state jurisdictions—are likely to have only limited effects and, therefore, to impact societies only very weakly (see Chapters 4 and 5).

To put this discussion in more concrete terms, consider the following example of regulatory entrepreneurship by several environmental organizations. Environmental Defense (ED), the World Wildlife Fund, and the Center for Energy and Climate Solutions have each struck separate agreements with a number of transnational corporations, including DuPont, BP, Shell International, Alcan, Pechiney, IBM, and Ontario Power Generation. The objective of these projects is to reduce corporate greenhouse gas emissions in line with the provisions of the Kyoto Protocol (which has been endorsed by the parties to the UN Framework Convention on Climate Change, but rejected by the United States). These companies, which are generally concerned about energy conservation, hope to acquire and trade emission reduction credits, along the lines of the bubble system, according to the terms of the Protocol. The agreement offers specific targets for corporations to be met through technological and organizational innovations, while the environmental groups offer technical advice, vet self-audits undertaken by the companies, and publish the resulting information (Revkin 2000; Cool Companies 2000).

These three environmental organizations have been deeply involved in both lobbying and advising in the climate negotiations, and ED, in particular, has staked out a position favoring market-based techniques for protecting the environment (e.g. Willey and Diamant 1996). Notwithstanding the defection of the United States from the Kyoto Protocol, it came into force in February 2005. This has provided the motivation for civil society actors to sell alternatives to the more state-centralized regulation of emissions envisioned under the agreement. The environmental organizations, which have a history of relationships with major corporations, are taking advantage of their political and brokering skills to offer a service for which there is, apparently, some demand. The ultimate success of such projects depends not only on corporations actually reducing their greenhouse gas emissions but in involving other, so far uncommitted companies, as well. If the project is successful, it will result in profits for the corporations, consulting fees for the environmental organizations, and, as we shall see, the privatization of public goods without any involvement whatsoever of the polity or its representatives.

There is a rather tricky aspect to the bubble system (as well as the greenhouse gas emission reduction system) that is worth examining more closely. If we regard the air around a point pollution source as an open access commons, similar to that about which Garrett Hardin wrote in 1968 (even if incorrectly; see McCay and Acheson 1987),<sup>9</sup> a “tragedy” arises not because of crowding of that commons by those living near the facility—their contribution to pollution is minimal—but because the plant’s owners have chosen to treat the commons as their own private property (this is rather like one farmer who owns a hundred cows blaming those who each own one for ruining the commons). In effect, “bubbles” and permits to pollute formalize the taking of the commons by making contractually private that which was previously treated as informally public (Guha 2000). Such permits have the effect of legalizing pollution of the commons without much in the way of consultation with those who must breathe the polluted air.

Further reflection on this “solution” highlights several other potential injustices and impacts that could be construed as involving the differential application of public rights (the “right” to clean air). Residents of Beverly Hills or the Santa Monica Mountains, both of which are within the Los Angeles airshed, already enjoy cleaner air as a consequence of income levels. Living far from and high above the offending emission sources, they can avoid some of the worst effects (except when they have to drive to Hollywood or UCLA). What they receive as a result of the bubble system is a better view. Residents of South Central, Southgate or the City of Industry, having both lower incomes and lower elevations, live in closer proximity to emission sources and freeways and, hence, continue to be exposed to higher concentrations of pollutants. These people have limited political voice with respect to regulatory processes and they possess little in the way of wealth that can be used to avoid the pollution (Hoffman 2004). Even under the bubble system, emission levels will remain highest near the pollution sources, and those who live nearby will suffer more than those who live farther away. The overall efficiency of resource allocation will be increased but, apparently, at the cost of the health of some.

So what? one might ask. After all, is not emissions reduction a form of investment in technological innovation and are corporations not entitled to fair returns on their investments? If they invest in the most efficient means of pollution reduction, they will see the greatest returns, and that is only fair. This, however, is not a complete analysis. For centuries, polluters have been pouring toxic and unhealthy wastes into what are, after

all, public commons, resources owned by no one but vital to everyone (and that is a true “tragedy of the commons”). Whereas informal appropriation of the type described by Hardin could be seen as unfair and a violation of customary law, formal privatization gives legal protection to the appropriator and dispossesses those who formerly “owned” a share in the commons. Pollution, in other words, represents the private appropriation of the resource—enclosure of the commons, if you will—without compensation to people (or other species) who have relied on the atmosphere for survival since life began.<sup>10</sup>

### Some concluding points

What is not immediately evident, perhaps, is the processes or forces behind the demand for privatized global regulation of social and environmental externalities. Most studies of the matter recognize the regulatory gap that has been created by globalization and see private regulation either as a remedy, since there is no world government, or as a more efficient means of accomplishing what national governments are unwilling or unable to do (e.g. Haufler 2001). Yet, these are descriptions rather than explanations. The problem is not that plausible international institutions are lacking—the International Labour Organization and the World Trade Organization come immediately to mind—but, rather, that the “marketization of politics” is indicative of a fundamental turn in the dominant mode of global governance (such as it is), one that is directly linked to globalization and the decline of the welfare state.

Furthermore, do regulations constitute “takings” of property, as is frequently argued? Do restrictions imposed, for example, in California’s Central Valley in order to protect endangered vernal ponds and fairy shrimp deprive owners of the fruits of their investment? Here, we enter the realm of the public-private divide and where it should be drawn. An “illegal” taking is argued to occur when some use or value of private property is denied to its owner. Because of the equivalence of property and capital, and the observation that the former could be transformed into the latter, invested appropriately, and earn some measurable return, any form of appropriation for which the owner is not compensated is deemed an unfair taking. Here, however, the essential “privateness” of property can be contested. Property is best understood as a *relation* among people, rather than a thing possessed by an individual (Veblen 1898; Macpherson 1962). That is, others in a society must recognize, through either title or custom, that an “owner” holds some relationship to the thing that is “owned.” Consequently, property exists only by virtue of the willingness of society to accept both the relationship between owner and owned *and* the relation between owner and society. Property is, in other words, a social construct whose privateness is subject to social consensus (and this is, as well, central to the concept of the “social contract”).

To be sure, such a consensus is not often something on which society is polled; instead, it arises out of certain customary and constitutional rules regarding title or juridically recognized possession. To the extent that the legitimacy of those who are “authorized” to regulate arises out of the real or imagined social contract and the degree to which the duly authorized obey fundamental constitutional rules, the violation or absence of regulations maintaining the public—private distinction may come to be seen as an illegal taking of property. Although this type of argument is usually pressed against

environmental regulation by the state, it can equally be applied to violations of human and other rights (an argument to which I return in Chapter 7).

There is a problem here when attempts are made to transfer such legitimacy to actors in the market: authority within the global economic system is highly diffused. There are *centers*, but no *center*, of power. Indeed, this distribution of power is a source of strength in the market system: decisions about resource allocation are made in a highly decentralized and disaggregated yet efficient fashion, as actors pursue their individual economic self-interests. As noted in Chapter 1, Adam Smith (1859) proposed that such behavior would produce a socially utilitarian outcome (the “Invisible Hand”), albeit one moderated by religious morality. He never reckoned with the secularization of society. Contra Smith, there are no constraints on human appetite and behavior except those which we impose upon ourselves. As a result, the only constraints on such behavior today are those imposed by the self or the state, and there are few incentives for individuals to limit their appetites if no one else is doing so (the collective action problem). Regulation, then, also serves as a control on individual (or corporate) appetite by defining what is unacceptable, excessive and/or destructive.

Here we encounter one of the contradictions of the contemporary global economy. States are eager to institute rules that shape markets to the advantage of capital, and are even willing to bind themselves in ways that limit their autonomy (as, for example, in the case of the WTO’s ruling on the Bush Administration’s steel tariffs during 2003). But states prefer to rely on a social sense of acceptable limits on economic activities rather than institute a prescribed set of restrictions. This is the “self-regulating market” at work on the liberal individual. The concept of self-regulation reminds us, again, of Karl Polanyi’s analysis in *The Great Transformation* (2001: ch. 6, 16, 17) in which he argued that previous efforts to create self-regulating markets led to the two catastrophic World Wars (it could be argued that a similar attempt to instantiate self-regulating markets over the past two decades has been a central cause of the War on Terrorism; see Lipschutz, 2002). These points, and others related to them, are taken up in Chapter 3.

### Notes

- 1 I define a *discourse* here as an integrated framework of normative beliefs, associated practices, and material infrastructures. This definition differs somewhat from that, in particular, of Michel Foucault, as well as others. The basic notion here is that people subscribe to the particular beliefs and causal arguments of a discourse and act on them. Their action produces and reproduces a material base that serves to confirm the validity of the beliefs, arguments, and practices. A discourse thus generates “truths,” although it is not a generator of the Truth (see also Hall 1995).
- 2 Classically speaking, this gap should not grow, as companies will compete by lowering retail prices on similar goods, thereby driving the profit level to zero. But since a growing fraction of apparel produced overseas is marketed for status, companies can charge much higher prices (see e.g. Trebay 2004; Pollin *et al* 2001).
- 3 Within the framework of neo-classical economics, “surplus value” does not and cannot exist, especially since goods produced within low-wage countries are sold competitively in rich countries. Nevertheless, there is reason to think that the profit margins on such goods do include a “labor component” for which workers are not remunerated.
- 4 Corporations often claim that they pay their workers more than the local minimum wage and, under the current international division of labor, it is the size of the labor supply and surplus

in the host country that determines the prevailing wage level. This, as I note below, does not necessarily imply that the minimum wage is a *living* wage.

- 5 Some forms of “regulation,” as shown by Peter Drahos (2003) with respect to intellectual property rights, actually constitute and consolidate monopoly and oligopoly positions.
- 6 I should note here in passing that a second aspect of today’s double movement is to be found in the United States’ War on Terrorism and war in Iraq. Polanyi argued that the attempt to institute self-regulating markets internationally would have, ultimately, resulted in a “stark utopia.” What happened, instead, was World Wars I and II. A similar problem has arisen out of the expansion of neo-liberalism and globalization, in this case triggered by the contradictions inherent in individual self-regulation and discipline. Paradoxically, perhaps, it is possible that the social externalities triggered by globalization played some role in the failures of individual self-regulation in the case of Al Qaeda and other such groups and organizations (see Lipschutz 2002, 2004c).
- 7 Note that a permit system does not eliminate entirely command and control rules. Some cap must be set on pollution, either as a total for each individual consumer of permits or as a total for the system as a whole, in which individual consumers can then buy and sell permits.
- 8 This process replicates the distributive consequences of economic growth in liberal economies: it is aggregate growth and not the distribution of increased income that matters.
- 9 Hardin’s tragedy arises because, he argues, in the absence of either binding law or contract, individuals will seek to maximize their share of a commons or public good, thereby denying it to others and ruining the resource.
- 10 It is, perhaps, true that the public benefits from the products whose manufacture generates the pollution. Whether this is adequate compensation for the resulting health and environmental impacts is not at all clear (see e.g. Hoffman 2004).

### 3

## **Creating a stark utopia? Self-regulating markets and the disappearance of politics**

Our thesis is that the idea of a self-adjusting market implied a stark utopia. Such an institution could not exist for any length of time without annihilating the human and natural substance of society; it would have physically destroyed man and transformed his surroundings into a wilderness.

Karl Polanyi, *The Great Transformation*, p. 3

### **Introduction**

What, exactly, did Karl Polanyi mean when he wrote these words? In *The Great Transformation*, he argued that it was the repeated efforts to create an international utopia of free markets and atomized individuals that, inevitably, led to the two World Wars as societies tried to protect themselves from the depredations of those very markets. In the absence of political intervention and control, markets generated externalities and a global tragedy. It was, he argued, the “disembedding” of economy from society that created the repeated crises of capitalism, generating what he called the “double movement”—the expansion of markets followed by protective reactions—and which, he hoped, his book might serve to prevent once again.

While there is much to critique in Polanyi’s analysis (e.g. Halperin 2004), his argument about the “double movement” and its relationship to the outbreak of war seems doubly apposite today in the midst of a “War on Terrorism.” What is central to this chapter, and the analysis offered later in this book, is Polanyi’s notion of “disembedding” which, in effect, requires the elimination of politics from political economy so that markets appear to be natural and “self-adjusting.” Neo-liberal globalization involves exactly this move, but it is hardly an automatic process. Self-regulation is hard work and, in this latest cycle of globalization, we see similar efforts to eliminate politics from political economy. And as some have noted (Vogel 1996), the result is more regulation, not less, or, as Polanyi (2001:147) put it, “Laissez-faire was planned; planning was not.”

Indeed, one of the most evident, yet least noted, consequences of the economic transformations and the privatization of regulation I described in Chapter 2 has been the virtual disappearance of politics and the political. In using these terms, I do not refer specifically to the institutionalized procedures of liberal democracy or the rather undemocratic modes of decisionmaking found in international forums or, for that matter, the behaviors of corporations in respect to their commodity production chains. To be sure, there remains much in the way of political debate and contestation, both within countries and internationally among interested and concerned individuals and parties, yet



such politics is focused primarily (if not exclusively) on *distributive* matters and the consequences of contemporary global market conditions. This is the “who gets what, when and why” of Harold Laswell’s famous formulation (1936). My use of the term “politics” involves something more fundamental and essential to social life: the direct participation of people in choices having to do with the conditions and making of their own lives, individually and collectively.<sup>1</sup> This is not the same as direct democracy or necessarily akin to the Athenian *polis* but it does resemble something along the lines of the activities of participatory political movements (Colás 2002; Notes from Nowhere 2003).

It is not my intention here to impugn existing liberal democracies and the quality of politics within them—I leave that to others (Mouffe 2000; Palast 2002). My primary concern here is, rather, with the absence of politics and the political, whether representative or participatory, at the international level, a problem often characterized as a “democratic deficit” (Underhill and Zhang 2003; Zweifel 2002). Nor do I intend to discuss potential modes of representation in international or global forums, such as “world federation” (Glossop 1993) or “cosmopolitanism” (Vertovec and Cohen 2002). Finally, I am not especially interested in exploring or theorizing forms of “cosmopolitan citizenship” (Hutchings and Dannreuther 1999) to redress this deficit, a form of political membership that, in essence, would remain national but come with a world passport (much as citizens of EU countries now have a common passport). As I will suggest in Chapter 7, however, the absence of politics and the political has much to do with the discourse (understood broadly as beliefs, practices, and outcomes) of citizenship as it currently exists.

Instead, in this chapter I examine what has become a standard and widely accepted means of seeking political goals that arises out of globalization: politics mediated through market-based mechanisms or, in my terminology, “politics via markets.” As I suggested in Chapter 2, there is a growing trend toward reliance on market-based mechanisms to accomplish political objectives, a method that largely disregards either the structure of the political economy giving rise to the problems being addressed or the power relations involved in the very structuring of that political economy. With a very few exceptions, all of the projects that are examined in later chapters in this book focus on the manipulation of consumer and producer behavior, performance, and preferences in the market, rather than on the structural conditions and foundational social and political decisions that foster the problems of concern in the first place. This is not, as I note above, the same matter as the widely noted democratic deficit in institutions such as the European Union. Rather, my focus is on the ways in which a growing intellectual and material commitment to the market as the answer to problematic social matters has resulted in a politics focused almost entirely on self-interest, articulated through social forces active in global civil society. This is not a new argument (Muller 2002), of course, but it is one that cannot be repeated too often.

I begin with an examination of ways in which politics has come to be subsumed within markets, with specific reference to the regulatory “regimes” described in Chapter 2 and detailed in Chapters 4 to 6. I then consider why global civil society is committed primarily to the market route to politics, rather than to a struggle to re-instantiate some form and degree of politics into “global life,” a point that I will pursue further in Chapters

7 and 8. Finally, I address the problem of “politics via markets” and its relationship to Polanyi’s “stark utopia.”

### **Where have all our politics gone?**

As I argued earlier in this book, there exists an important distinction between “constitutive” and “distributive” politics (Lipschutz 1989:17–20). Constitutive politics has to do with the “rules of the game.” Constitutive politics is about “constitutions,” that is, the processes of decisionmaking as well as the construction of those discourses that constitute and structure social and political life. Constitutive politics involves deciding and acting on the shared goals of a polity, of exercising the power to “do” (Arendt 1958). It has something of the “political” about it, in Sheldon Wolin’s (1996) terms. Distributive politics is about how points are scored, about the “what, when, and where” of governing (Laswell 1936). Most, if not all, of what today passes for “politics” in liberal market systems has to do with the distributive aspects of social life rather than with its constitution. After all, in Laswell’s definition, and as it is generally understood and practiced, the end of distributive politics within a liberal polity is the determination of how much is to be received by each party to a social contract and whether newcomers or non-members will be granted or denied a share of that pie.

Politics, in this respect, becomes the struggle for entitlements and the protection of what one already has. The fairness of the distribution comes to be judged, rather simply, on the basis of income, efficiency, or utility rather than other, deontological considerations such as justice, recognition, and capacity (Sen 1999; Isbister 2001). Under these circumstances, the constitutive basis for such decisions remains unexamined, and the “good life” comes to be defined by consumption and the market. The very discourse associated with “living the good life”—the traditional concern of politics and political theory and, it could even be said, republican democracy—has been transformed into “living life with goods.”

Consumption is valued, moreover, as the individual’s contribution to the public good, because to consume is to buy, to buy is to contribute to aggregate economic growth, and higher rates of growth lead to higher levels of utility, satisfaction with things as they are, and, it is assumed, social stability. Market-based, neo-liberal democracy focuses on increasing the size of the pie, rather than dividing it fairly, but this kind of “politics” is structured so that no one thinks to complain about the filling. Furthermore, the distribution of the pie becomes a technical and managerial task: people must fit certain standardized parameters—citizen, single parent, disabled—to receive their share (Luke 1999; Dean 1999). Under such arrangements, notions of justice or equity or even politics are subsumed under the beneficent consequences of growth and trickle-down economics which, in turn, are seen as providing the basis for opportunity (Isbister 2001). The means by which such growth takes place, and the power relations embedded within these means, are simply taken for granted as the consequence of the “natural” operation of markets. That there could be, and have been, alternative forms of economic and social organization, or that politics might encompass more than mere twiddling with the allocation of entitlements within a society, are ideas made to appear as outlandish (or perhaps more so) as discussions about aliens and UFOs.

The disappearance of constitutive politics and the political is evident at all levels of social activity, from the local to the global, but it is at the global level that this lacuna is most evident and problematic. This might seem contradictory or self-evident, insofar as the “global” (or international) is not a place where, we are told repeatedly, politics is possible (or, rather, the only politics that is possible is the realist politics of balancing and war). Of course, the plethora of institutions, conferences, conventions, agencies, organizations, and corporations that occupy and operate in the international/transnational/global arena seem to contradict this claim, but they are easily explained away as the offspring of the richest and strongest states, and are epiphenomenal to the reality of anarchy (Barkin 2003). Thus, in the conventional realist understanding of the international realm, it continues to be assumed that power will determine outcomes, and that any appearance of *political* conflict and contestation among parties is just another grand superstructural illusion.

Whether or not the realists are correct is largely irrelevant here. There is a politics of the global but it is a particularly pallid form of politics, for several reasons. First, it is primarily distributive, not because representative mechanisms are so underdeveloped—they are, but this is not inevitable—but because market mechanisms have become the favored tool for achieving global utilitarianism. Second, globalization and the instantiation of neo-liberal practices have codified internationally the structural division between public and private, in order to protect markets from political intervention. At the same time, no commensurate political authority has been created capable of shaping the global political economy so as to constrain the expansive tendencies of capital. Instead, the decentralized organization of markets lends itself only to the creation of weak institutions—aka international regimes—whose power rests in the stickiness of the bargains around which they have been established (the ease with which such bargains can be broken is evident in the G.W.Bush Administration’s numerous defections from various regimes and conventions). There is little in the way of coordination among these regimes and no centralized direction aside, perhaps, from certain ideological and operational tendencies. What all of these institutions share, however, is governmentality. I shall discuss the implications of this point shortly.

### **Is civil society “political”?**

There are two, rather broad conceptualizations of civil society in tradition and literature. The first is associated with the market and the private sphere (Ferguson, Smith, Marx), the second, with politics and the public sphere (Hegel, Gramsci, Colás). Although we tend to view Ferguson (1767/1995) and Smith (1776/1982) as the intellectual antagonists of Marx (1970), all three understood civil society (a) in terms of a separation between state (public) and market (private) and (b) as a realm of civil association beyond the reach or authority of the state. As propagated by Alexis de Tocqueville in *Democracy in America* (1835/1966), the liberal version of civil society visible in the United States provided both public goods that the state was unable to supply *and* private goods and affiliations that could only be obtained through the market and outside the state. Marx understood civil society in much the same terms, but regarded it as the cat’s paw of the bourgeoisie, which maintained a very visible line between state and market in order to

fence its private property off from the grasp of the masses. In Marx's teleology, consequently, when the proletarian revolution finally arrived not only would the state wither away but so would civil society. And with them would go private property as well as the market.

For Karl Marx, the ethics governing society clearly arose out of the desires and interests of capital (and the bourgeoisie), and the public sphere was, in any event, at their service. For Adam Ferguson and Adam Smith, society's morals were primarily religious ones whose source was transcendent and, consequently, not open to debate, challenge, or alteration. Businessmen would meet and plot, and to expect otherwise would be naïve, if not downright foolish. Their activities would have to be regulated, preferably via the moral force of religion but, if not, through public regulation (although not too much of it; this is why trust is seen as so central to capitalism; Fukuyama 1995). Thus, civil society would also determine what could be privatized and what could not.

The competing version of civil society's origins is associated with G.W.F.Hegel (1821) and Antonio Gramsci (1971; see also Adamson 1980, 1987/88) and elaborated more recently by Alejandro Colás (2002). It is, in many ways, a less prosaic and, perhaps, more romantic explanation, in keeping with its German origins. All the same, it is not any less correct than the political economists' version. According to Hegel, the ethics that underpin actor behavior in capitalist society originate within civil society. That is, social norms and practices originate within certain elements of civil society (bourgeois or national) and these are infused into the state through the force and actions of civil society. This view of ethics becomes important in terms of understanding different forms of political activism undertaken by civil society. Gramsci placed civil society between state and market and outside of the private sphere of family and friendship. In his framework, the "corporatebureaucratic state order with its linked capitalist economic order" (Nielson 1995:58) stood as a more-or-less unitary arrangement through which the hegemony of the capitalist class was both exercised and naturalized. Civil society then became "primarily a sphere of 'ethical-political' contestation among rival social groups" (Adamson 1987/88:325) struggling for ideological hegemony. As Kai Nielsen (1995:45–46) puts it:

In locating civil society we must look for those organizations or practices that are not directly governmental or economic but which generate opinions and goals, in accordance with which people who partake in those practices and are a part of these organizations seek not only to influence wider opinion and policies within existing structures and rules, but also sometimes to alter the structures and rules themselves.

Under these circumstances, evidently, civil society groups can become a threat to the established order, especially if they have political objectives or "seek to alter the structures and rules."

Colás draws on Gramsci to argue that civil society is the setting from which social movements and political activism originate, "within the context of capitalist modernity" (2002:43). In order to reconcile the two, apparently conflicting views offered by the political economists and the political philosophers, Colás further asserts that "civil society has historically found expression in two predominant forms—one linked to the private sphere of the capitalist market, the other to the struggles against the all-

encroaching power of the state” (2002:47). The former is populated by those organizations and actors who pursue their self-interest through the mechanisms of the market, the latter by those who seek to challenge and change the ethical structures and politics of the state. These are, to be sure, idealized forms: operating within the structures and strictures of economic liberalism, in which reproduction necessitates activities within the market, even the most dedicated social movement cannot survive on air alone. But note: activism through the market presumes that individuals’ morality can be called upon to effect social change; activism directed toward the state seeks to change the ethics binding on all of civil society and the market.

Civil society thus occupies a dual role in liberal systems. It provides the foundational values that underpin the specific form of and limits on markets even as its members expect the state to follow its dictates in this regard (not that this always happens). Not all elements of civil society are political; indeed, by the conventional definition (one shared by Locke *and* Marx, although with differing conclusions) civil society exists in some twilight zone between state and markets, engaged in activities that constitute and reproduce the fabric of everyday social life. Civil society is not considered to include the purely private realm, such as the family or the body, even though the norms of civil society as well as the laws of the state and the practices of the market all colonize and permeate the household.

What the two competing conceptions discussed above do not address directly is the following question: Are actors in the market, such as modern corporations, also part of civil society? The tradition of Ferguson, Smith, and Marx would say yes: the first two because the market is the realm of “freedom” and corporations certainly operate there; the third because it is the place where capital and the bourgeoisie control the mode of production. Hegel wrote about corporations, but not as we understand them today, since they did not exist in his day. His corporations were cities, guilds, and other similar associations. Consequently, in Hegel’s time “economic actors” were either individuals or companies run by individuals. In either instance, individuals were certainly members of civil society and were, therefore, bound to act according to the ethical code of the state. By the time Gramsci wrote *The Prison Notebooks*, corporations had become widely recognized as legal individuals in their own right. Certainly, however, Gramsci’s notion of civil society did not include such aggregations of capital nor the idea that capital might seek to propagate corporate morality through “social responsibility.”

These are ideal types, of course. “Really existing” civil society within a global system of neo-liberalism is a good deal more complicated and quite a bit less political. Civil society groups and associations, understood in the broadest sense, fulfill multiple roles and, although the balance between altruism and self-interest can vary greatly within individual organizations and groups, some of both can be found in all of them. The kinds of civil society projects discussed in this book are not often thought of as forms of “regulation” but, to the extent that they involve modification of habitual or customary rules of action, both individual and institutional, they do seek to regulate and manage individual and collective activities. The growing tendency to rely on regulation through market mechanisms has created something of a vacuum. Indeed, the relative lack of resources available to public regulatory agencies makes almost inevitable a reliance on the “good behavior” of corporations, property holders, and citizens. We might note, however, that it was the very absence of such good behavior that motivated the rise of the

regulatory arm of the state in the first place, more than a hundred years ago. Among its other features, the Progressive and Conservationist movements in the United States viewed the unfettered activities of the trusts as generating externalities unacceptable to the public good (Hays 1980).

### **Across the great divide**

This particular market—state confusion also highlights a more fundamental tension in contemporary capitalist societies: how and why are the public (state) and the private (market) constituted and differentiated? In liberal market systems, civil society provides the foundational values and ethics that underpin the specific form of and limits on markets, and civil society's members expect the state to follow its dictates in this regard (not that this always happens). In marking the divide between constitutive and distributive politics, between public and private, the liberal state therefore comes to rely on civil society to maintain and reproduce that boundary in two ways. First, the maintenance (and expansion) of the private realm mandates limits to activities that could be construed as “political.” Civil society, understood as a social formation rather than a part of the market, comes to be the realm within which acceptable collective activities can take place without impinging on politics in such a way as to threaten the inviolability of markets. Second, it is incumbent upon civil society to make the public—private division appear “natural,” which it does discursively through its efforts to prevent the state from intruding on “inappropriate” areas of daily life, especially those involving private property.

Given, however, that the state has long been interested in providing attractive operating conditions to capital, it has also fallen to civil society to protect the public sphere from appropriation by private interests. To this end, civil society must become politicized and through its efforts to exercise structural power through the state—a point to which I return in Chapter 7—to reinforce or reinscribe the separation between the public (politics) and the private (markets). But legitimate forms of action available to civil society for this purpose are constrained, and it is difficult to effect constitutive change without considerable struggle. Voting and lobbying tend to reproduce existing structures, while protests and violence are rejected by both state and capital as destabilizing and undermining of confidence in the system. What else is there? It is for these reasons that the absence of regulation has fostered the national and transnational campaigns that utilize lobbying, public pressure, influence, and expertise to effect regulation of capital (Wapner 1996; Keck and Sikkink 1998; Tarrow 1998).

This rather limited conception of civil society is a peculiarity of the methodological individualism of liberal theory and practice. Within liberalism, especially as fetishized in the United States, the only legitimate political actor is the individual—this is why, paradoxically, corporations are treated as legal individuals while labor and other social movements are not. As Mancur Olson deductively argued (1965), collective action ought only to occur through the aggregation of the interests of individuals who seek a return on their investment of resources and time. Olson found it difficult to explain the existence of groups who were not motivated by such self-interest but he was nonetheless forced to acknowledge their existence. What went unsaid by him, but has been of concern to

others, is that interest groups are able to exercise unwarranted and corrupt power as against the rest of society's members who, unable or disinclined to act collectively, remain individuals (e.g. Huntington 1981). This is why labor unions have always been regarded as problematic: their threat to withhold property (i.e. property rights to labor in the self, or "human capital") through the strike is envisioned as the theoretical equivalent of investors colluding to prevent the free flow of capital. (That this parallel is patently ridiculous and incorrect hardly makes a difference on the ideological battlefield.) In liberal theory, as suggested earlier, civil society thus becomes the realm of legitimate *non-political* collective action, of associations that are motivated by neither economic self-interest nor a search for power. Bowling leagues are an example of such associations (Putnam 2000). Because such associations pose no challenge to the political and economic order and, in fact, help to reproduce it, their existence is not a problem for that order.

The growing transfer of authority from the public realm to private agents in civil society, whether non-profit or corporate, therefore represents not so much the empowerment of the public, as the libertarian and pluralist literatures might have it, as, rather, a diminution of that very power. In engaging in such transfers, the state is able both to slough off its regulatory responsibilities, thereby placing the public interest in the hands of private actors, and to eliminate the political debate that ought to accompany the regulatory process, thereby ignoring the right of the polity to participate in regulatory decisionmaking. It is in this context that the "privatization" of regulatory authority and the need to counter certain restricted forms of rule-making should be contemplated. It is at this point, in particular, that global governmentality enters the equation.

### **Governmentality and the political**

Foucault never wrote explicitly about "global" governmentality—indeed, it is not even clear that he would have accepted such a notion. Within states there are political, social, and economic mechanisms that are part and parcel of management; among states, only the economic mechanisms are well developed. One consequence is that global governmentality relies heavily on markets for its effects; as Dean (1999:172) argues,

Neo-liberalism ceases to be a government of society in that it no longer conceives its task in terms of a division between state and society or of a public sector opposed to a private one.... The market has ceased to be a kind of "fenced-off" nature reserve kept at arm's length from the sphere of public service; instead, the contrivance of markets becomes the technical means for the reformation of all types of provision.... The point of doing this is...to reform institutional and individual conduct so that both come to embody the values and orientations of the market, expressed in notions of the enterprise and the consumer.

The implications of Dean's argument are clear: politics through markets is an acceptable practice because it serves merely to reproduce and legitimate those channels and capillaries of power that constitute and objectify those acting through markets. States do

it, and so does global civil society (GCS). Consequently, GCS ought not to be seen as a realm of autonomous actors outside of the state, whose members are engaged in efforts to reform, re-regulate, and repoliticize economic activities. Rather, GCS is complicit in the reproduction of those very structures and relations that generate their activities in the first place.

It is also the case that the arrangement of rules, regulations, and practices characteristic of contemporary bureaucratic capitalist states does not and cannot address more than a fraction of the “welfare of the population.” Much of the regulatory and welfare function is provided, therefore, through the efforts of capital and civil society, working to limit the state and to compensate for the state’s limitations. That is to say, the activities of civil society associations and organizations help to stabilize and normalize conditions that are seen as threats or disturbances to the welfare of human populations. The precise methods of accomplishing these ends are often highly contested, but the overall objective is the same. In this sense, much of what appears to be opposition—by civil society, social movements, etc.—is better understood as part and parcel of global governmentality. Populations in this instance are not composed of sovereign or autonomous individuals, as normally conceived under liberalism. Rather, they are regarded and treated as homogeneous collections of people who are molded institutionally into particular categories and forms, who regard themselves as belonging to these categories and forms, and who act accordingly.

In particular, governmentality produces populations that behave “normally.” Individuals comport themselves according to the standards of “normality” of their specific population. The right disposition of things is maintained through the standardization of populations within certain defined parameters, the self-disciplining of their own behavior by individuals conforming to these parameters, and the disciplining function of surveillance and law which seeks to prevent any straying outside of those parameters. Taken together, these constrain individuals’ practices to a “zone of stability,” or “normality.” Power is embedded within the discursive formations that naturalize normality and that motivate the reproduction of normal populations through associated practices. This is one of the senses in which, as Foucault puts it (1980:109–33), we are the products of power circulating through society in capillary fashion.

Thus, for example, those with HIV or AIDS are managed as a population with a specific set of characteristics for which treatment is available. The members of this population come to think of themselves and behave in terms of those characteristics. Normally, within neo-liberal governmentality, medical treatment is obtained through individualized means: each patient has a doctor. But private treatment of the disease with extraordinarily expensive drug “cocktails” excludes a vast fraction of the affected population, whose illness is regarded as a public matter. The lack of resources or medicines to normalize these individuals can also be regarded as an externality generated by the expansion of private ownership of Pharmaceuticals (Drahos 2003). This welfare problem can be addressed either by convincing the drug companies to reduce the price of the cocktails through appeals to “social responsibility” or through provision of the drugs by states as a public good recaptured from the private market sphere (see e.g. Russell 2003). In the absence of an authoritative center of power to make and enforce a structural change that would roll back the boundaries of the private, the productive power inherent in governmentality works to generate civil society organizations (CSOs) that, in effect,



rush in to fill this “power vacuum.” Thus, GCS comes to be internalized within the system of global governmentality that constitutes it, yet which GCS presumes to contest, regulate, and modify.<sup>2</sup>

The constraints associated with global governmentality have a critical but somewhat unremarked effect: political agency—that is, the possibility of sovereignty or autonomy—becomes a very difficult task (Epstein 1995). What generally attracts the greatest scholarly and public attention is the overt display of force or visible influence, and many who study GCS search for the signs of CSOs’ impacts on states’ decisionmaking and policies. Indeed, this is precisely the nature of Keck and Sikkink’s (1998) “boomerang effect,” through which transnational activists influence and manipulate states and other actors. Within governmentality, by contrast, what counts is not “getting B to do what A wants, even if B doesn’t want to do it” but, rather, “through discursive practices and processes *changing what B wants to do.*” To put this another way, social and political change within a governmental system does not follow simply as a consequence of the exercise of power, as it is normally understood. Instead, the common understanding of social relations—including relations of property—is discursively transformed in a way that does not threaten directly structural relations between public and private.

Indeed, it is not at all clear that autonomy is ontologically available within governmentality, inasmuch as normal behavior is highly prescribed and circumscribed. Moreover, even “resistance” may serve only to reinforce the processes of governmentality, as the demands and actions of dissident movements are absorbed or contained by the agencies and actors operating within the governmental system. While Foucault (1980:80–1) did not dismiss action, resistance, or revolution as pointless or futile, he did point out that opposition to governmentality may reinforce the very conditions that generate that opposition, for two reasons. First, if an action is deemed threatening enough to society, authorities (including a broad range of state and economic actors) are likely to attempt to manage the agents involved, through institutions—making the activities illegal and force—using the monopoly of violence to suppress the now-illegal activities. Second, actions whose goals are the regulation or modification of socially damaging practices tend to be absorbed into the governing mechanisms of society, through institutional means. That means is, increasingly, the market.

This further suggests a second difficulty associated with governmentality: what are the processes whereby CSOs are established and effect influence and even change? These are, quite clearly, more subtle and complicated than Mancur Olson’s (1965) theory of collective action within a market framework, whereby those who share interests form groups that seek to pressure state agents. I shall return to this question in later chapters; here, suffice it to observe, as already noted, that the apparently autonomous agents of global civil society are an effect of liberalism and its tendency to fragment society into individuals and politically inert associations. Hobbes’s work marks a boundary between earlier conceptions of the social body—the unified body of the church, so to speak—and the sovereign, individual bodies of liberal consumerism. Under the ancient regime, and in Hobbes’s notion of the sovereign’s “body,” individuals were part of the social whole. Hobbes saw that body not as a product of God’s action but, rather, as the result of the collective action of individuals in the state of nature. Subsequently, this notion was subsumed by the “nation-state” and nationalism, to whom individual citizens owed

unquestioning loyalty. But the autonomous agent has always been “free” only within the limits inherent in the social body. As part of a “social body,” constituted by an overdetermined system of agencies, institutions, rules, and practices, not only can one not escape the social body, but it is difficult even to act with complete freedom within it.

Foucault’s conception of governmentality helps to illuminate and clarify this fiction of autonomy, and to recognize the place of global civil society in world politics. Foucault does not argue that autonomy is impossible but, rather, that, within contemporary liberal social systems, autonomy does not exist *as we conventionally understand it*. His notion of governmentality does help to highlight a critical point. Global civil society is fully imbricated with the system of governmentalism that constitutes and subjectifies it, and which the former presumes to challenge, regulate, and modify. Agency thus appears to be highly constrained—but how constrained is it? I shall return to this question in Chapter 8.

### Politics via markets

Thus, we see in all of the above that the dominant governing mechanism of liberal societies is the market. It is also the context within which “politics via markets” has become the dominant mode of action. Within the institutions and agencies of the state, negotiation and bargaining, both quintessential market activities, are the norm for framing and passing legal statutes and undertaking administrative activities (Stone 1997). Lobbying involves bringing pressure to bear on the state through financial incentives and self-interested actors. Finally, voting is, for the most part, a matter of choosing among candidates and initiatives as though one were purchasing a box of cereal or laundry detergent. There is little in the way of collective discussion, deliberation, or decisionmaking among those in whom, notionally, sovereignty is invested. Under these conditions, there is only limited opportunity for the body politic to actively constrain externalities that might be injurious to society yet part of “business as usual.” Regulation is reduced to a matter of costs, benefits, and efficiency.

We can identify at least two reasons for the “triumph” of politics via markets. First, the discourse of the market has come to colonize society in an almost totalitarian fashion (Lipschutz 2001a). The market and its mechanisms are so dominant, and appear to offer such an efficient (and naturalized) means of muting conflict and struggle, that politics comes to be viewed as something odious and subversive rather than necessary to the life of human societies. Second, the thin quality of international politics, understood in a constitutive sense, and the thick presence of market-based institutions and practices militate toward growing reliance on civil society to accomplish what would otherwise be implemented through politics and the political, through its institutions and mechanisms. The absence of a strong international public sphere is part of the problem but the propensity of private interests to encroach on the public “commons” is a greater cause.

Within the Lockean state, aka the “watchman state” of classical liberalism, the rationale for expropriation of the public by the private rests upon the presumption that most human affairs can be conducted through the agencies and associations of civil society and the market. The only role for the state is the provision of a very few public goods, such as defense, guarantee of contracts, and protection of property rights. All else is hindered by the intervention of government. Civil life and association are located

within the private sphere and dominated by the market. Choice and freedom are exercised through the market, where each individual's preferences can be met through exchange of money for goods and services. Social change takes place only as producers innovate to meet consumer demand, which may alter patterns of behavior on a broad scale (as, for example, in the growing numbers of SUVs on American highways). Wealth is power, but no one is restricted from accumulating wealth and becoming more powerful, so long as contracts and property rights are not violated in the process (Barkin 2003).

The particular organization of liberal market societies, with public and private constituted as distinct realms of activity, relies on civil society to maintain and reproduce that boundary. To wit, the decentralized nature of such societies mandates limits to the number of activities construed as "political" (Mouffe 2000). Civil society then represents the arena in which group activities can take place without impinging on or threatening institutionalized politics or requiring "command and control" (contrast this with the party/state control of collective action found in totalitarian systems; see Lipschutz with Mayer 1996: ch. 5). Civil society also helps to instantiate the line between the political and the economic. Because the distributive shortcomings of capitalist markets always threaten to unravel the social contract and spill over into the political, it is incumbent upon civil society and the state to continually regulate the market so that it appears to be "natural." It falls to civil society to reinforce the separation between the political and economic through efforts to re-embed the economy in society without destabilizing that divide. But acceptable channels of action available to civil society for this purpose are relatively limited: protests and violence are rejected by both state and capital as destabilizing and undermining confidence in the system and, in some circumstances, are lumped in with "terrorism." As a result, the only apparently legitimate approaches to *regulating* markets come to be based on the *methods* of the market.

From a Marxian perspective, the division between public and private, and the reasons for that distinction, are necessary to capitalism and the activities of capital. Justin Rosenberg (1994) and Ellen Wood (1995, 2002), among others, argue that capitalism represents a historically unique separation of the political and the economic, the public and the private (akin to the disembedding of Polanyi's analysis). Political authority over property is hived off into the private sphere, where it is guaranteed by, but insulated from, political (i.e. state) power. Or, as Wood (1995:29) puts it, "the social functions of production and distribution, surplus extraction and appropriation, and the allocation of social labour are, so to speak, privatized and they are achieved by non-authoritative, non-political means." And, she (1995:29–30) continues,

The political sphere in capitalism has a special character because the coercive power supporting capitalist exploitation is not wielded directly by the appropriator and is not based on the producer's political or juridical subordination to an appropriating master. But a coercive power and a structure of domination remain essential.... Absolute private property, the contractual relation that binds producer to appropriator, the process of commodity exchange—all these require the legal forms, the coercive apparatus, the policing functions of the state.

Finally, she (1995:30) adds,

The “autonomy” of the capitalist state is inextricably bound up with the juridical freedom and equality of the free, purely economic exchange between free expropriated producers and the private appropriators who have absolute property in the means of production and therefore a new form of authority over the producers.

Note, here, that “coercive power” goes beyond the monopoly of violence, to include the power to impose rules that structure the political economy within which economic activities take place. *How* the political economy is structured whether it favors capital or labor—is, however, dependent on struggles between classes and among social forces and *not* some kind of abstract natural law or logic.

Thus, states, as the grantors and guarantors of private property rights, give to the owners of property what is, in effect, a private grant of political authority within a notionally limited domain. In theory, the owner of such property is empowered to do with it whatever s/he wishes, including destroying it to make a profit, even if such destruction disrupts things vital to human and natural life and well-being. Moreover, under liberalism, the state is enjoined strongly from intervening directly in those privatized domains, having given up its prerogative to impose rules there. To be sure, states often act to constrain individuals in what they can do with property in order to limit externalities, but this is decried as “political intervention in markets.” When such regulation is imposed, benefits to private parties are counterpoised to costs imposed on others and, because the former tend to be concentrated and while the latter are usually diffuse, private interests frequently trump notions of the public good or public commons. Companies would prefer to set the boundaries between the public and private as much as possible to their general advantage, especially where social costs are involved. They would prefer not to have to pay such costs but, if they are necessary, would rather determine for themselves how such costs, and how much, will be paid. This is “self-regulation.”

As a consequence, the public realm is left as a vulnerable arena of authority and property guarded by the state which is subject to class and social struggles over the boundary between public and private. *Political economy*, then, can be seen as the history, patterns, and effects of efforts by capital to maintain its distance from the state, to make that distancing appear natural, and to *foster the appearance that any state involvement in the organization of capital constitutes an unwarranted and illegitimate intrusion*. In effect, the state’s structural power is used to frame the regulations governing both the shape of markets and activities therein, and to create private property rights where none previously existed (Drahos 2003).

Property is key here, for it is *private* property that makes capitalism possible, and it is the expansion of the realm of private property that allows capitalism to grow and expand. Private property rights are, as suggested above, constitutional of a capitalist system, a constitution which also asserts, with few exceptions, that private property can only be bought, sold, or exchanged through the market, no matter how it might have been created originally. Yet, what the state giveth, the state can taketh away. That is, if it is within the power of the state to create and guarantee property rights through the carving out of pieces of the commons, it is also within the state’s power to eliminate those rights and restore private property to the commons. Of course, the state can, as a public entity, buy

and sell property, but it is prohibited from expropriating property without “fair market compensation” to the holder of title. The paradox in this phraseology and practice is that such property may have been expropriated from its original possessors without any such compensation, but legalized through the constitutional rule promulgated by the state. This was how, for example, the British Raj in India managed to transform village forests into state property, denying them to users with historical rights of access but no written title (Guha 2000). It also puts a rather different light on complaints of “unfair takings” associated with landowners in the American West.

What happens to property and property rights when they leave the constitutional safe haven of the state? Historically, title to property was recognized only within the jurisdiction in which it was issued, and its extra-territorial extension rode on the back of state power. For land and other fixed assets, this presented difficulties only under conditions of conquest, when the invading state might expropriate property and kill its owners (as was the case in Nazi Germany). For mobile property, the problem was solved only by mutual recognition of rights assigned by one country as legitimate within another (Drahoš 2003). Today, however, property can move among territorialized legal jurisdictions with such fluid grace, especially through cyberspace, that even mutual state guarantees are not enough to prevent unconstitutional appropriation or redistribution (consider, for example, efforts by the Motion Picture Association of America—MPAA—to sue individuals who download films off the Internet). And, of course, there is no global state to grant, monitor, and enforce legal title (Shaw 2000).

Hence, the concept of “economic constitutionalism,” addressed briefly in Chapter 1. To quote Kanishkajayasuriya (2001:452) once again:

Economic constitutionalism refers to the attempt to treat the market as a constitutional order with its own rules, procedures, and institutions that operate to protect the market order from political interference. These forms of economic constitutionalism demand the construction of a specific kind of state organization and structure: a regulatory state whose purpose is to safeguard the market order.

This “regulatory state” is, quite evidently, neither the classical nation-state, whose sovereignty and jurisdiction extend only so far as its borders, nor the watchman state, which oversees the market order and defends the polity. According to Jayasuriya (2001:454):

The functioning of the global economic order requires the existence of juridical institutions that will promote economic order, and its terms are often couched in a language of security. In turn, this means not the retreat of the state, but instead a new form of regulatory state that is able to constitutionalize the economy.

Jayasuriya’s regulatory state is closer to Michel Foucault’s concept of liberal “governmentality,” a set of knowledgeable institutions engaged in the management of things and populations. This regulatory “state” operates quite intentionally to depoliticize economic decisionmaking and procedures and to insulate both economic institutions and

capital from the vagaries of domestic “politics” and, as it were, threats to the constitutional order. It should be noted, in this context, that since World War II the United States has been able to transfer many of its domestic “economic constitutional” rules into the international sphere (see e.g. Braithwaite and Drahos 2000; Drahos 2003; Barkin 2003). Stephen Gill (2003:131–2) makes this latter point when he argues that “The new constitutionalism can be defined as the political project of attempting to make transnational liberalism, and if possible liberal democratic capitalism, the sole model for future development.”

The consequences of such economic constitutionalism are two. First, because market-based actors are now operating in an economic space whose global constitution trumps national rules, property rights are no longer subject to constraint, conversion, or confiscation by states as was once the case. This is the lesson of judgments by the dispute resolution panels of the World Trade Organization, which limit the extent to which states can restrict flows of property (commodities) into and out of their jurisdictions. The standing of corporations to sue for future profits lost as a result of state action under the terms of Chapter 11 of the North American Free Trade Agreement is another example of the constitutional inviolability of property rights. Second, any economic actor that might decide, for one reason or another, to regulate its own activities in this global economic space must do so privately, since there is, as yet, no recognized public authority with the competence to do so. The fact that states retain the right to regulate property and associated activities within their boundaries is of little matter, since economic actors can always liquidate real property and transfer capital assets to other jurisdictions. It is in this context—economic constitutionalism and the social impacts of associated activities—that self-regulation is offered as the “answer.” It should be evident, however, that self-regulation is also *private* regulation, and its implementation rests solely on the initiative and interest of the self-regulators.

### Creating the stark utopia?

As Polanyi makes clear, the regulation of the economic practices and impacts of capitalism was achieved historically through the agency of what has come to be called the “welfare state.” The welfare state, in the words of Esping-Andersen (1990), drawing upon Polanyi’s idea of “fictitious commodities,” sought to “decommodify” certain aspects of economic and social life. Polanyi (2001:75) proposed that land, labor, and money were not commodities: “the postulate that anything that is bought and sold must have been produced for sale is emphatically untrue in regard to them.” Yet, for markets to function according to the logics of classical political economy, these things must be treated as commodities. As Polanyi (2001:76) then pointed out:

To allow the market mechanism to be sole director of the fate of human beings and their natural environment...would result in the demolition of society. For the alleged commodity “labor power” cannot be shoved about, used indiscriminately, or even left unused, without affecting also the human individual who happens to be the bearer of this peculiar commodity. In disposing of a man’s labor power the system would,

incidentally, dispose of the physical, psychological, and moral entity “man” attached to that tag.

It is this to which Polanyi (2001:76–7) referred when he wrote that “no society could stand the effects of such a system of crude [commodity] fictions even for the shortest stretch of time unless its human and natural substance as well as its business organization was protected against the ravages of this satanic mill.”

From an analytical perspective, the particular division between the public and private in any given society is a puzzling one. It is one thing to argue, as did John Locke, that private property is the product of one’s labor (or the labor of one’s servant) and investment. It is quite another thing, however, to privatize that which is arguably or customarily in the public (and political) realm (Drahos 2003) or, in Polanyi’s terms, to fictitiously commodify something. The “right” of the worker to sell his or her labor in return for a rent paid by capital appears today as simple “common sense” yet, prior to 1850, it was widely regarded as “wage slavery” and quite unnatural (slavery, by contrast, was seen as a natural institution, no different than contemporary ownership of a horse or car). The emergence of this property right in the self was, in other words, not natural law but, rather, an expression of the actions of specific social forces and consequent regulation through the structural capacities of the state.

Decommodification—the second part of Polanyi’s double movement—was, therefore, the process of protecting labor (and people and nature more generally) from such indiscriminate use, and it involved the reassertion of social control over those aspects of life appropriated by capital as its private property. Decommodification was accomplished through the provision of social resources and entitlements to people and the deployment of “command and control regulations” that imposed restrictions on externalities generated by self-adjusting capitalist markets. *This was an essential function of the state granted the authority to structure the political economy in particular ways.* In exercising these prerogatives, the state was, in effect, taking back into the public realm certain “property” that had been privatized through commodification. Such internalization does not come cheaply and, according to many, including the advocates and practitioners of what has come to be called “neo-liberalism,” generalized decommodification represents an inefficient and ineffective allocation of resources because it generates no short-term returns or profits. In many countries, continues this argument, it also crowds out private investment, inasmuch as public needs compete for the same pools of capital. Politics, as practiced under these welfare regimes, involves a constant struggle among social forces, state and capital over the Great Divide that separates private from public goods.

For example, although human rights apply specifically to individuals, their observance and enforcement by the state can be considered a non-rival public good that each person can utilize for his or her own benefit and protection. As part of the notional social contract between citizen and state, such rights guarantee the inviolability of certain individualized attributes and practices against the state’s own coercive power. These guarantees are rationalized largely as natural law and instantiated universally in various written conventions to which states are subject. But other human rights are also hedges against the appropriation by capital of property in the self. For instance, the various conventions of the International Labour Organization are intended as guides for domestic legislation that imposes limits on capital’s exploitation of labor. Similarly, environmental

“rights” protect humans and nature from various externalities imposed as a consequence of both production and consumption.

It is in this light that corporate codes of conduct and corporate social responsibility must be assessed. Because governments are unwilling or unable to support their end of the social contract through regulatory decommodification, certain rights become unavailable as a general public good. Instead, they are provided by private actors. Consequently, the corporation—and not the state—becomes the guarantor of those rights, through documents and commitments with no legal or ethical standing. The private actor is held responsible for ensuring that such rights are provided, although to *whom* they are responsible—consumer or worker—is not so evident. These arrangements purport to guarantee the protection of the rights of society and nature, albeit on a self-regulating basis. Yet, what they actually do is *privatize* rights within a corporation’s specific commodity chain. Under these circumstances, the state has failed in its notional task of ensuring that the rights in question are available to all, while corporations appear to provide those same rights to their employees as a private good. These rights, however, are hardly universal. If fired, a worker loses those rights provided by the company, and the state is unlikely to step in to reinstate them (Boo 2004a). This hardly seems just. Furthermore, according to economic theory, it certainly must be inefficient to have so many individual enterprises in the business of granting, observing, and protecting such rights. And imagine the transaction costs!

Polanyi’s warning appears prescient today, inasmuch as we live in exactly the circumstances of which he warned: nothing less than the fantasized utopia of the self-regulating market. The disappearance of politics and the political, and its replacement by politics via markets, is a consequence of the apparently natural logic of globalization, but that disappearance is neither inevitable nor necessary. Arguments about efficiency and savings are meant to appeal to beleaguered taxpayers whose interests are assumed to lie with those who would reduce payments for public goods (especially those from which no evident benefits to the taxpayer are forthcoming). That privatization amounts to a transfer of wealth from the public purse to private beneficiaries, without a commensurate accounting of the social costs imposed on everyone, is left unmentioned. The cumulative impact of these costs, if left unaddressed, will result in yet another “stark utopia” (if it has not already arrived). But the market cannot be the means of addressing those problems and conditions caused by the market, even if they are internalized in the costs of production and consumption. Only politics can do that.

How can we bring politics back in? My answers to that question will be the focus of the last two chapters of this book; before that, however, we must first turn to an examination of cases.

### Notes

- 1 I note here what has been called the “paradox of participation,” which asks why individuals cast votes when they have virtually no impact on the outcome (with a few rare exceptions). In this instance, even as the state withdraws from the provision of public goods, individuals are being called on to participate in actions that provide those very services.
- 2 It is evident that, in making these arguments, I depart from the more traditional or popular understandings of the relationship between civil society and the state (e.g. Keck and Sikkink 1998; Wapner 1996). In earlier work, I argued that the two are mutually constitutive (1996);



under conditions of economic constitutionalism, civil society, state, and economy exist within a single institutional framework, that is, governmentality.

**Part II**  
**Doing well by doing good?**



## 4

# Doing well by doing it? Social regulation and the transnational apparel industry

### Introduction

Everyone knows the Nike “swoosh.” It is, perhaps, one of the most-recognized corporate symbols of the twenty-first century. Nike’s ad campaigns are ubiquitous, its shoes are coveted everywhere, and its stable of sponsored athletes is world-famous. Judged by the company’s current capitalization (as of 9 August 2004), Nike is worth more than \$18 billion (Quicken 2004). According to its web site, Nike strives to be an “innovative and inspirational corporate citizen” (Nikebiz.com 2003a) dedicated to environmental sustainability responsible manufacturing processes, and workers’ rights (Nikebiz.com 2002). But not everyone is convinced by the company’s glossy public relations; Nike has been a prime target for social activists who believe that working conditions in the factories with which the company subcontracts are not at all ideal.

Nike is an archetype of the new transnational corporation (TNC), what Jan Mazurek (1999) has called the “fables fabricator.” A company engaged in fables fabrication operates no manufacturing facilities of its own. As the Nike web site puts it, “We grow by investing our money in design, development, marketing and sales, and then contract with other companies to manufacture our products.” Those companies own and operate the 900 factories, employing 660,000 workers in 50 countries (including the United States; Nikebiz.com 2003b), and they are ultimately responsible for ensuring whether working conditions do meet both national and international standards. To its credit, Nike now requires its subcontractors to follow a standard Code of Conduct (Nikebiz.com 2004), one that is purely private. What difference this code makes in the lives of workers remains a matter of fierce dispute, as we shall see. As one of the critics (Connor 2001:9) of Nike has written,

While Nike touts itself as an “industry leader” in corporate responsibility, Nike workers are still forced to work excessive hours in high pressure work environments, are not paid enough to meet the most basic needs of their children, and are subject to harassment, dismissal and violent intimidation if they try to form unions or tell journalists about labor abuses in their factories. The time has come for the company to adopt the reforms which rights groups have advocated. It is indefensible that activists, consumers and most importantly Nike factory workers are still waiting for Nike to do it.

In this chapter, I focus on social movement and NGO campaigns to regulate social externalities associated with production of apparel for the US market. As I noted in

Chapter 2, these externalities involve substandard labor conditions and violations of human and workers' rights, including low wages, unhealthy working conditions, forced overtime, illegal child labor, and disregard for rights of free association (union organizing). The campaigns and projects I examine in this chapter are directed primarily at American and European apparel companies and their subcontracting factories abroad, and represent efforts to regulate the negative social impacts of production in developing countries. The campaigns take several forms, including consumer education, boycotts, and solidarity movements, efforts to impose codes of conduct on companies, and auditing and monitoring of working conditions in subcontracting factories. These are primarily "private" regulatory efforts (Hall and Biersteker 2002; Cutler *et al* 1999; Wiener 1999) focused on consumer and corporate behavior rather than public political processes, either international or in the host countries themselves.

I begin this chapter with a brief description of the apparel industry and the manner in which production of clothing has been reorganized over the past several decades. Because the Nike Corporation has garnered the greatest publicity in this regard, the second part of the chapter focuses on efforts to pressure Nike to improve labor conditions in its many subcontractor operations. In the third section, I assess the results to date of the varied campaigns, drawing in part on Nike's 2001 *Corporate Responsibility Report* and more generally discussing the empirical impacts of regulatory campaigns on labor conditions in five countries—Mexico, Cambodia, Thailand, Indonesia, and the Philippines. I also ask whether we see any effects outside of the factory walls—what I call "spillover." Given tensions between economic efficiency and the international division of labor, state sovereignty, and growing pressures for governments to promote human rights, what are the *political* effects of the various campaigns directed at transnational apparel companies? In this final section, I suggest several possibilities, but argue that the "state," whether national or supranational, remains essential to effective social regulation in the apparel industry.

### Who's doing it?

During much of the twentieth century, finished goods were manufactured in factories owned by companies whose name appeared on those products. Those factories were, for the most part, found in the home countries of those companies, with excess production often exported to foreign markets. At times, producers found it expedient to set up plants within host countries, in order to jump tariff and other trade barriers, but several decades of GATT rounds and a decade of WTO governance have largely, but not entirely, obviated that particular pattern of production. In recent decades, a new international division of labor, based on increasingly complex commodity chains, has become the rule (Gereffi 2002). This new pattern is especially evident in the transnational apparel industry. The most visible part of the apparel industry is comprised by the well-known companies whose names adorn clothing—often on the outside—and whose advertising is ubiquitous, but these are relatively few in number. The industry as a whole is made up of thousands, or even tens of thousands, of smaller companies, many of which employ only a few dozen workers.

These smaller enterprises often operate outside of the gaze of public authorities, and it is in this setting that sweatshops most often appear (Bonacich and Appelbaum 2000). As with the case of Nike, fewer and fewer of the major apparel corporations own or operate any factories of their own, instead subcontracting with specific plants—whose owners may be based in Japan, South Korea, Taiwan, or Germany—in host countries, such as Thailand, Indonesia, Mexico, the Philippines, and throughout Eastern Europe. This process is called “outsourcing.” Whereas outsourcing once meant having subcontractors manufacture certain parts of a product, which were then brought to an assembly line in a home plant, today everything is outsourced, including even the assembly of articles of clothing in subcontracting plants, sometimes in several different countries.

Thus, the initial design of new clothing products takes place in the United States or Europe, in consultation with athletes, market researchers, designers, focus groups, and others. Depending on the item, the company signs contracts with a number of factories in different countries to manufacture batches of clothing or even different parts of particular items. Subcontractors link up with even smaller operations for special tasks. The parts are then sent to another plant, where they are assembled into the final item and the product is packaged for shipment. At the other end of the production pipeline, the contracting company arranges for a distributor to receive the shipment and send it on to retailers. The contracting company itself does not have to invest in production, shipping, and retailing hardware or infrastructure. If the market for a particular product, or all of them, turns sour, the company can simply stop ordering and use up existing stocks (ideally, it has no such inventory, having sold it off to retailers). It has no long-term commitments to anyone but its shareholders (Klein 2000: ch. 9; Rosen 2002: ch. 10; Mazurek 1999: ch. 3).

Of course, the retail apparel market is not uniform, either. At the higher end, high-priced fashion is produced in relatively small batches; at the lower end, in mass quantities. Even though the cost of production does not vary that much between high- and low-end clothing, brand and relative scarcity allow a significant mark-up on clothing by apparel companies and retailers. The authenticity of the brand is of particular importance in this respect, protected under internationally recognized trademark regulations meant to prevent counterfeiting and maintain monopoly (Braithwaite and Drahos 2000; Drahos 2003). The apparel companies are especially vigilant for such items, whatever their quality, for they not only lose money when consumers buy copies, but their brand is also devalued if consumers begin to associate it with low-quality or inexpensive goods. The irony here is that the relative costs of producing the genuine and counterfeit item are not likely to differ very much, due to the nature of the subcontracting process. It is only at the retail end that the high-profit value of a branded positional good, such as a Hermes handbag, can be realized.

This dispersal of the apparel production chain represents, in part, an effort to spread financial and operational risk. As Edna Bonacich and Richard Appelbaum (2000:9–10) point out in their work on the apparel industry in the Los Angeles area:

Much of the industry is driven by fashion, and sales of fashionable garments are highly volatile. The production of apparel is generally a risky business, which discourages heavy capital investment and limits the availability of capital for firms that want to expand or upgrade. The

riskiness is augmented by time. Fashion can change quickly. Apparel manufacturers want to be sure that any demand is fully met, but must be wary of overproducing garments that may fall out of fashion. The industry needs to be especially sensitive to changes in consumer taste, to respond quickly to these shifts, and to cease production in a timely manner.

A high degree of international subcontracting becomes possible not only as a result of declining shipping and communication costs, but also because parts and pieces are moved not merely *among* countries, as conventional trade theory would have it, but also *within* corporate production networks, where transfer pricing reduces or eliminates certain types of costs, such as taxes on the full value of the product. It is in this light—the changing landscape of the global economy as well as the volatility of the industry—that the position of large US and European apparel corporations and their subcontractors should be understood.

The operating environment faced by a typical clothing company is, thus, a very complex one, and this makes its behavior somewhat unpredictable. While its primary objective is the maximization of profit for the benefit of shareholders and management, there are many other, lower-order objectives and obstacles critical to corporate success. On the one hand, for example, companies must maintain the integrity of production chains while anticipating—and sometimes directing changes in fashion; on the other, they have to keep an eye out for regulatory violations, labor unrest, organized campaigns, and boycotts. All corporations, whatever their size, confront a complicated and constantly changing set of operating conditions in the areas of finance, technology, supply of raw and semi-processed materials, labor relations, national regulations, competition, and consumer tastes, among others, and working conditions in subcontracting factors are only one consideration out of many (Table 4.1). The number of factors that play a role in a company's fortunes are multiplied by the number of countries in which it does business *and* the number of subcontractors and factories with which it deals (as in the case of Nike). As a result, a company can find itself subject to all kinds of problems and uncertainties: informational lacunae, physical attacks, legal actions, competitive pressures, and consumer boycotts.

Beyond this, the regulatory environments faced by corporations in host countries and at individual production sites also vary a great deal. As a rule, the variation is less a matter of existing legislation than enforcement of those laws. Industrialized countries have much more in the way of resources and personnel available for and committed to policing than do developing countries. A country's desire to attract foreign investment may also lead to a lax regulatory environment although, as noted in Chapter 2, debate continues over whether governments seek deliberately to create "regulatory havens" that advantage capital over labor and nature. The extent to which many governments constrain regulatory standards in export processing zones (EPZs) suggests, however, that such havens can play an important role in terms of comparative advantage.

*Table 4.1* The regulatory environment facing a typical apparel company

<i>“Traditional” environment</i>	<i>“Globalized” environment</i>
Domestic laws and regulations	Domestic laws and regulations
Customs and customary law	International laws and regulations
Labor unions	Customs and customary law
Financing considerations	Subcontractors
Consumer tastes	Labor unions
Competitors	Financing considerations
	Transnational shipping and production chains
	Environmental quality
	Currency risks
	Consumer tastes
	Competitors
	International agencies and NGOs
	Corporate associations
	Monitoring, auditing, certification
	Boycotts and negative publicity

Where labor laws are concerned, many states have ratified most if not all of the relevant basic International Labour Organization (ILO) conventions (Table 4.2). The owners and operators of clothing factories are obliged to observe the laws of the jurisdiction in which they operate and, to the extent that these ILO conventions have been implemented domestically, they are binding. At the same time, however, factory management is under no legal responsibility to exceed the minimums established by those laws and, if they can get away with it, there is no compelling reason not to violate them. Indeed, the absence of monitoring and enforcement of these laws by governments, and the general lack of institutionalized political support for labor in many developing countries, only makes violations a necessary part of “doing business” in a competitive global environment.

Such notional constraints on illegal or anti-labor practices as may exist in host countries are further weakened by the practice of outsourcing and subcontracting. When apparel corporations do not own the plants with which they subcontract, it is none of their concern whether or not domestic law is observed. As we shall see later in this chapter, and in Chapter 5, they can, as part of an agreement with the subcontractor, require that certain rules, or “codes of conduct,” be followed within subcontracting factories (see Figure 4.1; Fung *et al.* 2001; Pearson and Seyfang 2001; Jenkins *et al.* 2002). But even these are weak constraints; as one veteran activist has observed, from one day to the next subcontractors may post and remove codes of conduct as a function of whoever has ordered a specific production run (Quan 2001).



*Table 4.2* Fundamental ILO conventions relating to labor rights

<i>Convention</i>	<i>Number of countries that have ratified</i>
Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87)	141 United States: no
Right to Organize and Collective Bargaining Convention 1949 (No. 98)	152 United States: no
Forced Labour Convention 1930 (No. 29)	161 United States: no
Abolition of Forced Labour Convention 1957 (No. 105)	158 United States: yes (1991)
Equal Remuneration Convention 1951 (No. 100)	159 United States: no
Discrimination (Employment and Occupation) Convention 1958 (No. 111)	157 United States: no
Minimum Age Convention 1973 (No. 138)	118 United States: no
Worst Forms of Child Labour Convention 1999 (No. 182)	131 United States: yes (1999)

Source: ILO 2004b.

One consequence of relatively weak labor standards and enforcement of such laws as are on the books has been the global spread of the “sweatshop” model. The term is used to cover a broad range of operations and working conditions, which range from small establishments with a few sewing machines to large plants. The US General Accounting Office defines a sweatshop as “an employer that violates more than one federal or state labor law governing minimum wage and overtime, child labor, industrial homework, occupational safety and health, workers’ compensation, or industry registration” (US GAO 1994:1). Developing country status is not a prerequisite for the existence of sweatshops; this definition applies specifically to operations within the United States, where the US Department of Labor (1996) has estimated that as many as half of the more than 22,000 garment shops are in serious violation of wage and safety laws. As Bonacich and Appelbaum (2000) have shown, sweatshops are more a function of industry structure than general economic development. To a significant degree, in other words, their existence is a result of weak enforcement, and not necessarily the absence of regulatory law, as such.

### **Stop doing it!**

What is to be done? Activists, academics, and others have documented large numbers of shops and factories whose workers labor for long hours, under fairly appalling conditions, receiving wages that are often at or below the legal minimum (see e.g. Connor 2001; O’Rourke 2000; Boje 2002). In most instances, moreover, not only do workers confront industrial and political environments in which their rights are systematically ignored, but they also lack the structural power necessary to instantiate those rights, largely as a result of the “reserve army of labor” at the factory gates. This is not a new problem (Lichtenstein 2002), but it has been exacerbated by outsourcing (Lawrence 1996). One

hundred years ago, during the heyday of Western union organizing, manufacturing was hardly foot-loose at all and, when workers organized nationally or by sector, they were often able to disrupt production rather effectively. Even so, achieving workers' rights required long and often bloody struggles.



*Figure 4.1 Nike Code of Conduct (reproduced with permission of Nike Corporation. Copyright 2004, NIKE. All rights reserved).*

The situation in developing countries today is not that much different from the West a century ago. Capital views unionization as an obstacle to efficiency and profit; states

worry that labor activism will drive capital away; workers fear—with good reason—that attempts to organize will get them fired. Those who defend the existing system argue that, at least, apparel workers in developing countries have jobs, which pay more than the local minimum wage and represent a first step toward upward mobility. If workers were able to organize and press for higher wages and better working conditions, continues the argument, this would only induce capital to seek more attractive investment conditions in other countries (thereby replicating the earlier industrial shift from the Northeastern United States to the South and West). As I suggested in Chapters 1 and 2, this argument is somewhat disingenuous, but it points to the key problem for labor: competition among countries for foreign investment, weak or non-existent monitoring of working conditions and enforcement of labor law, and the relatively small number of workers employed in factories make the organizing environment for workers that much more inhospitable.

It is into these regulatory gaps that activists and corporate actors have stepped. In the case of the apparel industry, in particular, we find what is usually called the “anti-sweatshop” movement (DeWinter 2001), composed of a large and apparently growing number of organizations and coalitions, and the “corporate social responsibility” movement, which includes both activist and corporate groups (Jenkins *et al* 2002; see also Chapter 6). A number are listed in Table 4.3 and can be categorized according to the distinctions made in Table 2.2. With the exception of the ILO, there is not much in the way of “interstate public” activity, although the members of the World Trade Organization have become increasingly concerned about workers’ rights as a potential non-tariff barrier to trade. Under the category of “public economic” campaigns, we find only a few government bodies. Several cities, such as Toronto, New York, and Cleveland, have passed municipal ordinances forbidding the procurement of apparel produced in sweatshops. A number of the anti-sweatshop campaigns and groups are university-based. By and large, however, there are no “private political” campaigns or organizations seeking to strengthen the ILO regime or establish a new one, although several of these organizations are concerned with domestic enforcement of existing labor law. The final category, “private economic,” is where most regulatory projects are found, including labor union efforts, transnational campaigns, individual organization projects, corporate monitoring and codes, and university-based groups.

*Table 4.3 Organizations engaged in private regulation of the apparel industry*

<i>Organization/campaign</i>	<i>Type/membership</i>			
	<i>Labo r</i>	<i>NG O</i>	<i>Corp .</i>	<i>Uni v.</i>
AFL-CIO ( <a href="http://www.aflcio.org/sweatfree/10_steps.htm">http://www.aflcio.org/sweatfree/10_steps.htm</a> )	✓			
UNITE ( <a href="http://www.uniteunion.org/">http://www.uniteunion.org/</a> )	✓			
ICFTU ( <a href="http://www.icftu.org/">http://www.icftu.org/</a> )	✓		✓	
Worldwide Responsible Apparel Production ( <a href="http://www.wrapapparel.org/infosite2/index.htm">http://www.wrapapparel.org/infosite2/index.htm</a> )				✓
International Collegiate Licensing Association ( <a href="http://nacda.ocsn.com/icla/nacda-icla.html">http://nacda.ocsn.com/icla/nacda-icla.html</a> )				
Business for Social Responsibility ( <a href="http://www.bsr.org/">http://www.bsr.org/</a> )			✓	
Lawyers Committee for Human Rights ( <a href="http://www.lchr.org/labor/home.htm">http://www.lchr.org/labor/home.htm</a> )		✓		
Fair Labor Association ( <a href="http://www.fairlabor.org/">http://www.fairlabor.org/</a> )	✓?	✓	✓	
Campaign for Labor Rights ( <a href="http://www.campaignforlaborrights.org/">http://www.campaignforlaborrights.org/</a> )		✓		
Clean Clothes Campaign (Europe) ( <a href="http://www.cleanclothes.org/">http://www.cleanclothes.org/</a> )			✓	
Sweatshop Watch ( <a href="http://www.sweatshopwatch.org/">http://www.sweatshopwatch.org/</a> )*		✓	✓	
Global Exchange ( <a href="http://www.globalexchange.org/">http://www.globalexchange.org/</a> )*			✓	
Nike Watch (Oxfam Australia) ( <a href="http://www.caa.org.au/campaigns/nike/index.html">http://www.caa.org.au/campaigns/nike/index.html</a> )*			✓	
Press for Change Nikeworkers ( <a href="http://www.nikeworkers.org/index.html">http://www.nikeworkers.org/index.html</a> )*		✓?		
United Students Against Sweatshops ( <a href="http://www.usasnet.org/">http://www.usasnet.org/</a> )				✓
Corporate Watch ( <a href="http://www.corpwatch.org/">http://www.corpwatch.org/</a> )			✓	
National Labor Committee ( <a href="http://www.nlcnet.org/index.htm">http://www.nlcnet.org/index.htm</a> )*			✓	
Ethical Trading Initiative ( <a href="http://www.ethicaltrade.org/">http://www.ethicaltrade.org/</a> )		✓	✓	✓
As You Sow ( <a href="http://www.asyousow.org/">http://www.asyousow.org/</a> )			✓	
Fair Wear (Australia) ( <a href="http://www.awatw.org.au/fairwear/">http://www.awatw.org.au/fairwear/</a> )			✓	
Nat'l Mobilization Against Sweatshops ( <a href="http://www.nmass.org/">http://www.nmass.org/</a> )			✓	
No Sweat (United Kingdom) ( <a href="http://www.nosweat.org.uk/">http://www.nosweat.org.uk/</a> )			✓	
Maquila Solidarity Network (Canada) ( <a href="http://www.maquilasolidarity.org/">http://www.maquilasolidarity.org/</a> )			✓	
Workers' Rights Consortium ( <a href="http://www.workersrights.org/">http://www.workersrights.org/</a> )				✓
Global Alliance for Workers & Communities (Nike-sponsored) ( <a href="http://www.theglobalalliance.org/">http://www.theglobalalliance.org/</a> )				✓
Asia Monitor Resource Center (Hong Kong, PRC) ( <a href="http://www.amrc.org.hk/">http://www.amrc.org.hk/</a> )			✓	

Boycott Nike-Vietnam Labor Watch ( <a href="http://www.saigon.com/~nike/">http://www.saigon.com/~nike/</a> )*	✓	
Academics Studying Nike ( <a href="http://cbae.nmsu.edu/~dboje/nike.html">http://cbae.nmsu.edu/~dboje/nike.html</a> )*	✓	✓
Co-op America's Sweatshop.org ( <a href="http://www.coopamerica.org/sweatshops/index.html">http://www.coopamerica.org/sweatshops/index.html</a> )	✓	
US Labor Education in the Americas Project ( <a href="http://www.usleap.org/index.html">http://www.usleap.org/index.html</a> )	✓	
SOMO-Centre for Research on Multinational Corporations (Netherlands) ( <a href="http://www.somo.nl/">http://www.somo.nl/</a> )	✓	
Commission for the Verification of Corporate Codes of Conduct (Guatemala) ( <a href="http://www.coverco.org/">http://www.coverco.org/</a> )	✓	
Verite ( <a href="http://www.verite.org/">http://www.verite.org/</a> )		✓ ✓
Social Accountability International ( <a href="http://www.cepaa.org/">http://www.cepaa.org/</a> )	✓	✓ ✓

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*Source:* Compiled by author and research assistants. URLs were current as of 2004. Note that many companies have individual corporate codes and social responsibility programs; these are discussed in Chapter 6. An asterisk (\*) indicates that Nike is one of the targeted corporations.

In recognition of the structural obstacles facing apparel workers in many places, activists and campaigners in the “anti-sweatshop” and “corporate social responsibility” movements have chosen to pursue an indirect approach to achieving workers’ rights. Whereas unions generally use their location in the production system to pressure capital, NGO, university, and corporate campaigners try to exert their influence via the consumption system, through efforts to shame, cajole, or bully apparel companies. As noted earlier in this book, these campaigns focus on two points in the commodity chain—producers and consumers—in preference to the public regulatory environment in which apparel is produced and consumed. In the first instance, activists try to influence consumer preferences through unfavorable publicity about working conditions in a company’s factories, with the goal of exerting pressure. If large numbers of consumers can be convinced to reduce or eliminate their brand loyalty as a result of appeals to individual conscience and morals, companies will face a decline in revenues and profits and, perhaps, flack from shareholders. It does not take a great deal of such unfavorable publicity for corporate executives to start worrying about brand reputation, even though there is only limited empirical evidence to suggest that activist campaigns either alter consumer choice or affect the corporate bottom line (Klein 2000; Schoenberger 2000).

In the second instance, corporations are pressured to live up to certain generally accepted normative standards, to wit, that workers not be over-exploited or exposed to dangerous working conditions or made to suffer ill-health from the factory environment. (These, by the way, are the same standards sometimes regarded as violating the “cultural preferences” that underpin comparative advantage.) Codes of conduct specify such standards, stand as a statement that the company will abide by them, and ensure that those with whom it does business will do the same. By implication, then, socially conscious consumers will prefer products made under the terms of such codes, which will redound to the benefit of the corporation and enhance its bottom line. Again, there is no empirical evidence to indicate that either of these two outcomes follows from the adoption of a code of conduct, although it has been suggested that there might be some competitive “ratcheting up” among companies (Fung *et al.* 2001). But all of this assumes

that the codes are actually observed, something that is not always clear from available empirical evidence.

What, exactly, is being asked of consumers? First, it is assumed that each individual makes her consumption choices on the basis of self-interest, which may be economic or political. Second, it is assumed that a consumer exercises deliberate moral discretion in making decisions about what to consume, although it might be necessary to educate him or her about the moral implications of those choices. Made aware of these implications—which are nevertheless often contested—the consumer will select items produced in accordance with higher normative standards in preference to those that are lower-cost but may be produced through greater exploitation of workers. This selection process, if repeated in large numbers, will result in an aggregate preference for particular products and induce corporate management to institute a code as a form of self-protection. Ultimately, other companies, faced with declining market share, will be compelled to do the same. To the extent that codes of conduct, when observed, result in higher labor standards in factories, workers' rights will be instituted and protected even though public authorities have played no role in the regulatory process. According to this logic, state involvement is unnecessary and even undesirable.

But there may be a catch, one to which I will return in greater detail later in this chapter. First, these projects rely on consumer behavior in markets to achieve political ends. A shift in individual preferences aggregates to corporate observance of workers' rights. Second, it is assumed that, so long as workers' rights are observed *within* the targeted sector or industry, the job has been done. Yet, there is very good reason to think that activist campaigns have an impact *only on the targeted companies and their subcontractors in the apparel commodity chain*. Adoption by companies producing other kinds of goods, or by other labor sectors, is neither inevitable nor even likely. In other words, projects, campaigns, and codes that do not address the political context within which violations of labor regulations are taking place—in specific *political* jurisdictions—are likely to have limited effects outside factory walls.

This is not unlike a problem seen in relation to self-regulated common pool resources. Anthropologists have studied a number of informal institutional arrangements governing the exploitation of shared resources (McCay and Acheson 1987; McCay 1998), such as lobsters in Maine and oysters in New Jersey, and have found that these are stable under two conditions: first, that there are no users besides those who already have access to the resource; or, second, that some higher authority guarantees the legality of the arrangement and ensures that outsiders are not allowed in. In the case of codes of conduct, the situation is rather the reverse. Here, a notionally public good—workers' rights—is being offered to a limited number of “users” within the factory, but the lack of a public guarantee and protection means that the workers receive less in the way of rights than they would if the state ensured similar access to everyone. In this case, those outside the factory receive nothing at all.

### *Who did it first?*

What are the origins of the anti-sweatshop and codes of conduct movements? Neither boycotts nor codes are recent phenomena (Frank 1999; Monroe Friedman 1999), but the anti-sweatshop movement emerged sometime during the 1980s, as a result of growing

concern within the AFL-CIO about the impacts on US labor of what some academics were then calling “the global factory” (Grunwald and Flamm 1985). This involved the growing trend of apparel outsourcing from the United States to developing countries, and the growing volume of textile imports into the United States, which were having an especially serious impact on older, unionized industries and factories in the Northeast. In 1988, the AFL-CIO “discovered” the existence of “late-19th and early-20th” century apparel sweatshops in Indonesia. It seems unlikely that these were something new, inasmuch as textiles had been produced in volume in Asia since the 1700s. But no one had really been paying attention until 1989, as one researcher (Bullert 2000a: 5) put it, when

the U.S. Agency for International Development provided a human rights grant to the Asian American Free Labor Institute-Indonesia [an AFL-CIO project] to do a minimum wage compliance survey of factories that produce goods for the export sector. In a survey of several hundred factory employees, lawyer, labor advocate and researcher, Jeff Ballinger, found the workers were paid just under 14 cents per hour. The plants that manufactured Nike shoes were the worst offenders.

As a result, that same year Ballinger launched a campaign, “Press for Change,” against Nike and for the next six years struggled to bring the problem to public attention, without a great deal of success. Not until he joined forces with Global Exchange, a San Francisco-based nongovernmental organization (NGO) in 1996, did the anti-Nike campaign really take off (Bullert 2000a, 2000b; see also p. 82).

Other groups were also getting into the action during this time. In 1989, the Center for Research on Multinational Corporations (SOMO) in the Netherlands began an investigation into the subcontracting practices of C&A, a large European clothing company based in the Netherlands. In 1990, SOMO launched the Dutch “Clean Clothes Campaign,” which was subsequently expanded to the rest of Western Europe as well as countries where apparel was produced. In the United States, similar campaigns were initiated by organizations concerned about Third World development (e.g. Global Exchange and the Transnational Action and Research Center, now CorpWatch, in Oakland, California), while others were founded out of concern about sweatshops in the United States (Coalition to Eliminate Sweatshops in California) and abroad (Sweatshop Watch). These groups were later joined by student-initiated campaigns on American university campuses (United Students Against Sweatshops), labor unions (UNITE, formerly the Garmentworkers Union) and NGOs concerned about labor conditions in free trade zones around the world (Maquila Solidarity Network). Over the following decade, the anti-sweatshop campaign grew into a bona fide social movement and became increasingly sophisticated in terms of strategy, tactics, and visibility (Klein 2000; Schoenberger 2000:206–8; Bender 2004; Esbenshade 2004).

But the anti-sweatshop movement did not attract real media attention until the day Kathie Lee Gifford cried on television. In 1996, Charles Kernaghan, with an organization called the National Labor Committee, returned from a tour of Central American sweatshops, carrying a bag of clothing labels. Among these were several from Gifford’s fashion line. One of Kernaghan’s colleagues convinced him that publicity about Gifford’s

relationship to sweatshops would most certainly garner media and consumer attention. It most certainly did, with major television exposure as well as the appearance of some 63 newspaper articles (Bullert 2000a: 21). When a crying Gifford claimed on her talk show that she had no idea her clothing line was being sewn by teenage girls in Honduras, working 14- to 16-hour days, even the White House paid attention (Bullert 2000a:7).

That August, President Clinton established a task force, called the Apparel Industry Partnership (AIP). Corporate, labor, and NGO representatives were invited to cooperate on the development of minimal working standards for apparel factories operating in the United States and other countries. While the participants resolved a few points, they were unable to even agree on the definition of “sweatshop” much less what constituted a “living wage.” By 1999, the AIP had been renamed the Fair Labor Association (FLA), and most of the unions and NGOs had dropped out. The FLA went on to support voluntary codes of conduct and require its members to establish internal monitoring systems to ensure the codes were being observed (Bullert 2000a). It also insisted that companies allow FLA-accredited monitors to verify that factories were meeting the codes. Since 1999, the FLA has rebuilt its membership and, to some degree, its credibility, to include a range of NGOs from around the world (FLA n.d. a). Other anti-sweatshop organizations continue to criticize the FLA, however, for its tendency to favor management when problems arise in apparel factories (see e.g. National Labor Committee 2003).

Over the past decade, both the anti-sweatshop and the code of conduct movements—at times, in certain organizations, the two are virtually indistinguishable—have grown considerably. In terms of sheer numbers, the anti-sweatshop movement appears larger, but the FLA claims, for example, to have signed up 14 apparel companies with more than 3,000 factories in 80 countries (FLA n.d. b) as well as 175 universities and 1,100 collegiate licensees (FLA n.d. c, b). Indeed, corporate codes of conduct seem to have become the most popular method of responding to concerns about working conditions in subcontracting factories (Haufler 2001). Although absolute numbers are difficult to come by, a 1996 KMPG survey of 1,000 Canadian companies found that 66 percent claimed to have a code of conduct (ILO n.d.), while a 2003 World Bank study (Smith and Feldman 2003:2) suggests that “there may now be an estimated 1,000 codes in existence” (although this number, while encompassing more than the apparel industry, seems too low).

### *Is Nike doing it?*

For both strategic and tactical reasons, campaigns to pressure American and European apparel manufacturers have chosen to focus on those that are best known, for example Nike, Reebok, and Tommy Hilfiger. Such companies have an interest in protecting their brand reputation and they are concerned, as well, about influencing consumer choice in their favor. Those that advertise their wares most widely seem to be especially vulnerable to pressure: they want their brand to be imprinted in the minds of consumers but, as suggested by the Kathy Gifford story, high brand awareness can backfire if the company is found to engage in unethical or illicit behavior. While the effects on consumer choice of these campaigns are difficult to track, and are rarely discussed outside of the business pages and movement web sites and publications, a well-organized attack on corporate



ethics can garner considerable publicity and political capital for activists (Bullert 2000a, 2000b). The campaign against Nike provides a particularly illustrative example of the breadth of such efforts (the following is based largely on Nike's corporate history as found on the company's web site at <http://www.nikebiz.com/>).

Over the past three decades, Nike has become one of the best-known and most visible athletic shoe and apparel companies in the world. It has done so not only because many athletes and sports-minded individuals have developed a strong preference for its shoes but also because its advertising campaigns and celebrity endorsements have been so widespread. This was not always so. Originally founded in 1962 as "Blue Ribbon Sports," the company acquired its present name in 1972. Revenues went from about \$2 million in 1971 to \$1 billion in 1984, \$2 billion in 1989, to more than \$12 billion in fiscal year 2004, with a return on equity approaching 22 percent (Nike 2004:13; see also Table 4.4). In 1979, Nike claimed to hold 50 percent of the US running shoe market although as the sports apparel industry has become more competitive the company's relative market share has declined. Nike may have been a pioneer in foreign apparel outsourcing; from the very beginning, it relied on foreign suppliers. In 1971, the company began to contract directly with factories in Japan to manufacture its shoes.

As Nike's outsourcing increased, so did the number of groups and coalitions that targeted the company, beginning with Jeffrey Ballinger's "Press for Change" campaign in the late 1980s, and including easily a dozen or more today (Bullert 2000a, 2000b; see Table 4.3). Under considerable pressure from these activists, Nike has taken great pains to respond positively, to publicize its activities on behalf of workers, and to present a positive corporate image, one sensitive to the demands of its critics and the working conditions in its subcontractors, factories, as can be seen on its web site (<http://www.nikebiz.com/>). Over the past 15 years, it has adopted a Code of Conduct and a Memorandum of Understanding setting conditions for its subcontractors (1992), signed on to the Athletic Footwear Associations' "Guidelines on Business Practices of Business Partners" (1993), hired Ernst and Young to conduct audits in selected overseas factories (1994), joined the Apparel Industry Partnership-Fair Labor Association initiated by the White House (1996), established a Labor Practices Department (1996), and agreed to pay a minimum wage to Indonesian workers (1997). Nike has become a major corporate sponsor of Business for Social Responsibility (1998), announced that it would adopt US OSHA standards at subcontractor factories (1998), and raised the pay of its Indonesian workers to \$6.07 a week (1999). Student monitors have

*Table 4.4* Recent financial statistics for the Nike Corporation

<i>For the year ending 31 May</i>	<i>1997</i>	<i>1998</i>	<i>1999</i>	<i>2000</i>	<i>2001</i>	<i>2002</i>	<i>2003</i>	<i>2004</i>
Revenues (millions)	\$9,186	\$9,553	\$8,777	\$8,995	\$9,489	\$9,893	\$10,697	\$12,253
<i>Geographic distribution</i>								
United States	\$5,538	\$5,460	\$5,042	\$5,017	\$5,144	\$4,670	\$4,658	\$4,794
Asia-Pacific	\$1,242	\$1,254	\$844	\$955	\$1,110	\$1,358	\$1,349	\$1,613
Net income (millions)	\$796	\$400	\$451	\$579	\$590	\$663	\$474	\$946
Return on equity	28.5%	12.5%	13.7%	17.9%	17.8%	18.2%	18.9%	21.6%
US market share	47%	51.1%	48.9%	39.2%	na	32.5%	na	na

Source: Nike 2004, earlier Nike financials, and various Internet sources

been permitted to inspect plants (2000), and the company has hired major global accounting firms to conduct labor and environmental audits of its factories (O'Rourke 2000). Nike requires that a subcontracting factory pass an audit before a contract is signed and, in cases where egregious violations are found, it will withdraw the contract. It is a cosponsor of the Global Alliance for Workers and Communities, a group funded by Mattel, the World Bank, the MacArthur Foundation, as well as the International Youth Foundation, and remains a member of the Fair Labor Association. In short, Nike seems to have responded in an exemplary way to its critics, providing a model both for the effectiveness of campaigns and corporate behavior.

In 2001, Nike issued a *Corporate Responsibility Report* offering information about the company's expectations regarding the environmental and social performance of its subcontractors, as well as some evaluations of how well they were meeting those standards (it has not released such a report since). Much of the report consists of public relations material and general descriptions of Nike's efforts to address a variety of problems. And there are many problems; as the Director of Corporate Responsibility Compliance puts it, "How much do we really know about issues in all of these factories? Not enough" (Nikebiz.com 2001:2). For example, in an assessment of the effectiveness of its monitoring program in Cambodia, the authors of the report write (Nikebiz.com 2001:4) the following:

In the summer of 2000, the British Broadcasting Corporation (BBC) said it had proof that a Nike contractor in Cambodia was using child labor. In a broadcast in October, it said so on air, and showed film of three workers admitting to being under the age of 15.

Whether the workers in question were the age they attested to in applying for jobs, with supporting documents, or were the age they attested to on camera, we probably will never know. But the government insisted after an investigation that all were of legal working age, and all continued to work. Because of this issue and a number of compliance questions, Nike decided to cease production at that factory.

What did this episode teach us about our monitoring? First, that the system is flawed when we can begin production in a country where proof of age does not exist, or is unreliable, and no one flags that problem. We are now revising our country entry strategy to deal with that larger issue. Second, that to renew business in Cambodia, we must have a far higher level of assurance that age standards are verifiable. In Cambodia, we will not do business with a factory unless it is a participant in the International Labour Organization's monitoring program.

(The ILO's monitoring program in Cambodia is discussed below.)

More recently, Nike has established programs to conduct SHAPE (safety, health, attitude, people, environment) and Management Audits. According to the FLA, "SHAPE Audits are conducted periodically in all Nike facilities on an announced and unannounced basis. Management Audits are targeted at facilities where Nike has developed strategic partnerships and at higher risk facilities.... During SHAPE Audits,"

Nike compliance and sourcing staff conducted factory walkthroughs to evaluate basic health and safety, as well as environmental compliance, and some management practices, such as reviewing time cards and management and worker training records. Management Audits were performed by third-party monitoring groups, and included intensive audits of payroll and time card records, working hours, management and worker interviews, and a factory walkthrough to evaluate working conditions benchmarked against Nike's Code of Conduct.

(FLA 2002:50)

And (FLA 2002:51):

When noncompliance issues were identified during SHAPE, Management Audits, and FLA independent external monitoring visits, Nike compliance staff worked with factory management to develop a "Master Action Plan" that addressed the findings of past audits and periodic compliance visits. These corrective action plans designated specific individuals within the factory responsible for addressing each identified issue, along with timeframes for completion. Often, remediation involved incremental improvements, since Nike reported that it generally was not possible to remediate every problem in a factory simultaneously. Through management and worker training, as well as other corrective actions, Nike maintained a general policy of committing the necessary time to bringing cooperative factories into compliance.

Nowhere in the FLA report, however, is there any assessment of the extent to which Nike complies with the "law of the land" in the country in which a factory is based. Indeed, when problems are found, there seems to be a tendency to blame labor; according to the report (FLA 2002:85), "The most common findings from independent external monitoring visits related to low worker awareness of their legal rights and their rights under the Code of Conduct or participating companies' workplace standards."

Alas! Few of Nike's efforts have been rewarded with a clean bill of health from campaigners. According to various reports, surveys, and studies undertaken by outside observers and critics, none of the steps taken by Nike has fundamentally altered conditions in the company's many subcontractor factories. For example, a compilation of reports issued by the Union of Needletrades, Industrial and Textile Employees (UNITE) suggested that labor problems continued in many plants producing goods for Nike (UNITE 2000). An analysis of the methods used by accounting firms inspecting and monitoring factory labor conditions and practices by Dara O'Rourke, who accompanied auditors into factories, found that many violations and hazardous conditions were routinely missed or ignored (O'Rourke 2000, 2004: ch. 6). Global Exchange, which approved Nike's programs in 1995 and was severely chastised by others for doing so, published a survey (Connor 2001) of the company's efforts for the period 1997–2000, and concluded that they were largely superficial. The clearest change came in the area of health and safety standards, but even these accomplishments were undermined by non-credible monitoring practices and a lack of transparency. In 2004, Oxfam and several

other organizations charged that, once again, Nike and other apparel companies were violating workers' rights (*Business Journal* 2004; Play Fair 2004) while a group of unions representing 3 million workers in the United States and Canada charged Nike with violating Canadian workers' rights (Calvert Online 2004).

What is not so clear is whether the various campaigns directed at Nike have had the expected effect on the company's revenues or profits. Has there been a decline in revenues and profits as consumers learn about various violations of workers' rights and growth as Nike has put in place its various monitoring and compliance programs? In May 1998, the value of Nike's stock dropped almost 27 percent, perhaps due to a decline in sales growth as a result of bad publicity (although the inference is correlational rather than causal). As can be seen in Table 4.4, the company's financials do not indicate any obvious impact. Much of the decline in revenues and income during 1999 and 2000 is attributable to the 1998 Asian financial crisis. Revenues from the United States have stayed fairly flat since the large increase between 1996 and 1997, with some growth in Asia and Europe. While this might indicate some impact on consumers, the data do not provide compelling evidence one way or the other. Fierce competition and sales of higher-priced products seem to explain most of the numbers. At the same time, generally positive media attention generated by Nike's efforts—this despite the company CEO's attack in 2000 on a student campaign at the University of Oregon and his withdrawal of a sizable donation—and the relative paucity of hard data seem to have reassured consumers that problems are being addressed (see e.g. FLA 2002).

### *No one's doing it!*

A more problematic issue raised by the Nike case, and apparel campaigns more generally, is the extent to which codes of conduct, monitoring, and remediation by individual corporations, largely applied in their subcontracting plants, serve to change the fundamental *political* environment for labor in host countries. I take it as a given that working conditions and wages are important for individual well-being and satisfaction, and that there is no ethical reason for super-exploitation of workers when the cost of labor is such a small part of the retail price of a good (but see Nikebiz.com 2001, "Labor Practices," p. 12). Workers might be better off in one or even a large number of factories as a result of the good works of corporate executives in far-away places. What legal guarantees do they have, however, that these conditions will be protected or maintained, especially if the corporate contractor concludes that codes are too costly or decides to do business elsewhere? What binds a company to follow its commitments when there are no compulsory reasons to do so? And, even if rights of free association are enshrined in national law, of what long-term significance are near-term rights and benefits granted to individuals at the behest of a benevolent corporation? To put the problem another way, how do changes in corporate behavior in specific plants affect the *political* status of labor rights in the host country as a whole?

Notwithstanding "ratcheting-up" arguments (Fung *et al.* 2001), according to which companies will improve their transparency and performance for competitive reasons, there is not much evidence to indicate that codes of conduct, regular monitoring, and improvements in working conditions and wages by apparel companies have had an impact on the attitudes of governments and factory owners with respect to workers'

rights. As a recent ILO (2004a:21) study has put it, “The disturbing reality is that in many parts of the world and in a number of economic sectors, freedom of association and the right to collective bargaining are not respected. Even where they are recognized in law, those seeking to exercise their rights can face serious difficulties.” This point is largely echoed by the Fair Labor Association (2002) as well as the Play Fair Campaign (2004:5), which argues that

For many of these workers, the ability to defend themselves from exploitation and abuse is thwarted by the repression of their rights to form and join trade unions and to bargain collectively. Too many obstacles—be they administrative or legal, or lack of an identifiable or legitimate employer because of the complexity of these supply-chains, or sheer fear through intimidation and harassment—still exist, leaving them exposed to unfair, inhumane, and undignified treatment by employers.

Other questions may be raised in this regard: If labor conditions are improved in one factory in a specific country, what are the impacts on others? If labor conditions are improved in plants subcontracting for one apparel company, does this lead to improvement in the plants subcontracting for others (and sometimes, of course, one plant produces for more than one company)? If labor conditions are improved in the apparel sector of one country, do they improve in other industrial sectors? And, most important, do improvements in the labor environment of individual factories enhance the overall power of labor in relation to capital? In other words, do transnational activist and corporate social responsibility campaigns intended to impose privatized social regulations on transnational capital manage to keep in check the very “self-regulating” markets that generated the social externalities of concern in the first place? *Do market-based approaches to regulation generate positive political consequences for labor?*

Under external pressure through the market, apparel corporations may impose codes of conduct on subcontractors in developing countries. They may provide incentives and punishments to improve labour conditions in specific factories. They may even pay wages above the legal minimum requirement and provide the opportunity for workers to organize (Connor 2001). Yet, what are the results *outside* the factory walls? Is there evidence that activist campaigns and corporate codes have triggered major regulatory responses by states or a more supportive state stance toward labor, especially in terms of the right of free association? A few observers and researchers argue that there has been a broadening of campaigns, into other sectors and regions (Bullert 2000a, 2000b; see also Taylor and Scharlin 2004), but there is a surprising absence of empirical research, let alone evidence, to indicate that either campaigns or codes have had political results.

For the purposes of my discussion, I call this effect—a general sector- and countrywide upgrading of labor rights as a result of changes in corporate behavior—*spillover*. If spillover is taking place as a result of reforms instituted in selected factories, it should become evident across sectors and countries, and visible in increased state regulation and public support for workers’ right to free association (i.e. to form legally recognized and empowered trade unions). If there is no obvious spillover, or if evidence suggests that the state continues to disregard labor laws and even violate them (by, for example, sending police into factories where strikes are taking place), it is a good bet that

campaigns and codes have not had significant political results. A more likely result is some combination of these possible outcomes, in which workers have organized independent unions in some factories, in which some sectors are being organized more broadly, but to which there continues to be resistance by both state and capital.

The range of possible outcomes can be articulated as follows:

- *Effective spillover*: Activist campaigns against American and European apparel corporations, and codes of conduct implemented within factories, do have social and political impacts, that is, they result not only in the formal recognition of workers' rights to organize but also in actual improvement of labor's status in the country as a whole, evidenced by the formation and recognition of national, sector-wide, and factory-based unions and the enforcement of rules by appropriate state authorities.
- *Partial spillover*: States are willing to move some way in the effort to legislate and enforce social regulations and to establish capacity for some degree of control over the political conditions governing labor and other rights, but governments remain sensitive to the interests of investors, often to the disadvantage of labor.
- *No spillover*: There is no evident spillover even though workers in some factories labor in improved conditions and have been able to organize within individual plants. This results either because states have not felt pressured to assert their authority in the area of labor rights enforcement, or because they are successfully resisting such pressure for fear of losing foreign investment as well as political power.

There are several good reasons to think that campaigns and codes might not result in much in the way of spillover. Notwithstanding economic and econometric models, or arguments about cultural preferences and comparative advantage, social regulation is more than just a question of efficient allocation of resources. Regulation inevitably means that both capital and consumers will have to pay the costs of internalization, which means redistribution of resources and income. The arguments and justifications for such redistribution must come about in the political arena, where warnings about costs must be tempered by concerns for justice and fairness. Inevitably—and this is a point to which I will return in later chapters—such decisions are based on questions of power. To be constitutive, they must happen within the jurisdictions where laws are debated, formulated, implemented, and monitored. Global social regulations are not irrelevant to this process, to be sure; one version of the possibilities for effective global regulation can be seen, for example, in the monitoring and enforcement mechanisms of the TRIPS (Trade-related Aspects of Intellectual Property) Convention of the World Trade Organization (Braithwaite and Drahos 2000; Drahos 2003). International regulatory conventions set normative standards to which states must adhere and, having ratified them, citizens can demand that governments observe them (Soysal 1994; Thomas 2001). But it is only through political action *within* states that societies will come to recognize and acknowledge the need for social regulation and accept and internalize that need as a necessary part of global industrialization, development, and economic growth.

For the purposes of this chapter, and because of a paucity of sector-level information, in the following pages I address the question of spillover from three perspectives. First, I focus on the status of workers' rights in the industrial sectors of five Pacific Rim countries—Indonesia, Cambodia, Thailand, Mexico, and the Philippines—as reported in periodic surveys of labor violations by the International Confederation of Free Trade

Unions (ICFTU). As seen in Table 4.5, in contrast to the United States these developing countries have ratified most of the fundamental ILO conventions dealing with labor rights and working conditions. Ratification does not indicate anything about domestic legislation, monitoring, and enforcement or, for that matter, what kinds of unions have been organized where they are permitted and what degree of political power they might possess. Enforcement of relevant labor law is famously weak or wholly non-existent, even in the United States.

Second, I look more closely at Indonesia, a country where the right of free association was restricted and then permitted, but in which unions are nevertheless facing challenges due to “flexible labor contracts”; Mexico, where enforcement of labor rights remains notoriously weak; and Cambodia, which agreed, as a condition of a textile trade agreement with the United States, to support an international monitoring program. I also discuss the more recent free trade agreement between Jordan and the United States. Third, I report on the results of interviews conducted in 2001 during a research trip to four Asian countries—Indonesia, Thailand, Hong Kong, PRC, and the Philippines. The interviews were intended to document private and public efforts in Southeast Asia to develop, introduce, and enforce global social regulations designed to address and curtail the harmful social, economic, and environmental externalities that are commonly linked to globalization.

*Table 4.5* Ratifications of fundamental ILO labor conventions

<i>Convention</i>	<i>Indon esia</i>	<i>Cam bodia</i>	<i>Phil ippines</i>	<i>Mexico</i>	<i>Thai land</i>	<i>United States</i>
Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87)	1998	1999	1953	1950	X	X
Right to Organize and Collective Bargaining Convention 1949 (No. 98)	1957	1999	1953	X	X	X
Forced Labour Convention 1930 (No. 29)	1950	1969	X	1934	1969	X
Abolition of Forced Labour Convention 1957 (No. 105)	1999	1999	1960	1959	1969	1991
Equal Remuneration Convention 1951 (No. 100)	1958	1999	1953	1952	1999	X
Discrimination (Employment and Occupation) Convention 1958 (No. 111)	1999	1999	1960	1961	X	X
Minimum Age Convention 1973 (No. 138)	1999	1999	1998	X	2004	X
Worst Forms of Child Labour Convention 1999 (No. 182)	2000	X	2000	2000	2001	1999

*Source:* ILO 2004b. “X” indicates convention not ratified.

#### *What are they doing?*

The ICFTU issues periodic reports on labor standards and conditions for the WTO General Council as well as annual reports on labor violations in individual countries. The

WTO has an interest in avoiding pressure to take on international labor regulation; hence, numerous and widespread reports of violations might, eventually, be taken as a sign of a need for greater intervention by international organizations. The following extracts are taken from the ICFTU's reports on each of the four countries:

**Indonesia:** Since the Suharto regime ended in May 1998, Indonesia has thrown out its draconian labour laws which prevented workers from forming trade unions and provided for the use of military force in settling industrial disputes. Private sector workers are by law free to form workers' organisations and draw up their own rules. Under the Trade Union Act adopted in 2000, unions must be registered with the Manpower Ministry. They are required to have at least 10 members, a reasonable limitation by international standards.... A court can dissolve a trade union if its basis conflicts with the 1945 Constitution, or the Pancasila, the national ideology which puts the emphasis on consensus and national unity, or if its members or leaders have committed a crime against national security in its name and have been sentenced to at least five years in prison for that reason.... The law makes State interference in the internal affairs of the trade unions legal.... According to the Indonesian Prosperity Trade Union (SBSI), relations between government, big business and workers have still been tense. Frequently, when workers try to set up trade unions, companies either fire or demote union leaders and members, making workers afraid to organize or join a union. Trade unionists also cite a growing number of attacks on their organizers by paramilitary groups, supported by the military and police and paid for by employers, in order to intimidate workers or break strikes.

(ICFTU 2003a)

**Cambodia:** There were some improvements in respect for rights in the garment sector, following pressure from the US, but in general employers remain strongly anti-union. There were reports of trade unionists being fired and even imprisoned for their activities.... The right to bargain collectively is also protected by law, but it is not necessarily a trade union right. The law states that all companies must choose a "representative" regardless of whether a trade union has been formed there or not. Hence, employers can negotiate with a "workers' representative" who is not from the union, even where a union exists.... Most workers have little or no knowledge of trade unions, or of their labour rights. Where unions do exist, in the garment and footwear industries, as well as the tourism and education sectors, it is difficult for them to negotiate with management on equal terms. Many of the garment workers are young women from the rural areas. Employers do not hesitate to use anti-union discriminatory practices to deal with trade union members, even going so far as to fire them. For its part, the government has never taken action against employers nor punished acts of anti-union discrimination.... Labour inspectors are poorly trained and, in view of their low pay, are open to



bribery.... Strikes are frequent in the garment factories, with workers protesting against long hours, low pay and poor treatment. The government generally tolerates strikes and demonstrations, although the police are sometimes called in and have been known to use violence.... There have been improvements in the respect of rights in the garment industry following a landmark agreement in 1999 with the United States, which agreed to increase its quotas for Cambodian textiles in return for positive evidence that Cambodia was complying with international labour standards. Textiles are Cambodia's biggest export earner and the US its biggest market. The US demands, further to union pressure, were made as a result of the history of poor conditions in the sector, including long hours, forced overtime and low pay. Pressure from unions and the US government has improved the legal protections for union leaders and the collective bargaining process.

(ICFTU 2003b)

**Philippines:** The law recognizes the right of workers, including public employees, to form and join trade unions, although organizing is restricted in the public sector.... Many legal obstacles make it difficult for workers to enjoy their trade union rights, especially in the public sector. Employers frequently use all sorts of tactics to bust the unions.... Union activity is still strongly discouraged in export processing zones.... The Law also prescribes heavy penalties for participation in an illegal strike. Trade union leaders are liable to prison terms of up to three years. Anyone who organizes or directs any "meeting for the purpose of spreading propaganda against the government" is liable to life imprisonment or the death penalty. The term "meeting" covers the notion of picketing during a strike.... The government and employers also take advantage of the restrictions in the law to obstruct the right to strike.... Instead of playing an impartial role, the government tends to interfere in labour disputes to the benefit of the employers.

(ICFTU 2003c)

**Mexico:** Although the Constitution and the Labour Law recognize freedom of association and the right to strike, the full exercise of trade union rights is frustrated by restrictions on these freedoms, acts of repression, and the authorities' connivance in employers' violations. The situation is most dire for workers in the public sector and in the thousands of maquiladoras.... Many education, media, government agency, maquiladora workers and the Instituto Nacional de Antropología e Historia researchers are employed through "civil contracts for providing professional services" and are obliged in some instances to sign a declaration to acknowledge that it is not an employment contract. Under these terms, they are not legally permitted to organize or join a union, but can only become members of civil associations, and do not have the right to take strike action or to negotiate collective agreements.... There are

frequent abuses in the country's 4000 or so maquiladoras. The government makes very little effort to apply legislation in the export processing zones where they operate, as it welcomes this massive influx of capital.... Establishing an independent trade union, in other words, a union that is not controlled by the employers, can resemble an obstacle course. The difficulties associated with obtaining legal status are used by the government to deny a union the right to register or to give preference to a particular union leader over another. Employers themselves sometimes set up a union, although workers may not even know there is one in their factory, because there are no meetings, no elections and no collective bargaining.... The State or employers often deploy tactics to have a strike declared illegal, such as hiring strike breakers to provoke acts of violence and calling on government forces.... The government has also resorted to "requisitioning," which in practice means calling on government forces or strike breakers to take over the workplace operations.

(ICFTU 2003d)

**Thailand:** Workers in both the public and the private sectors are allowed to form and join trade unions, with the exception of civil servants. In spite of certain legislative changes, many obstacles still prevent workers from enjoying all of their trade union rights, and a current revision of the Labour Relations Act would further undermine these rights. Union-busting and harassment of trade union members are widespread.... There is no specific protection for union founders or committee members. Despite the ban on anti-union discrimination, therefore, workers can be legally fired for any other reason provided they receive severance pay, even if they are union leaders, a provision which can easily be abused.... Unions in Thailand report that employers frequently dismiss workers who try to form trade unions. In some cases, they are fired while awaiting registration, in others they are fired ostensibly for non-union reasons invented by the employer.... Another means of circumventing trade union activity is outsourcing, which has proved increasingly popular among employers, notably in the garment and textile industries.... According to a survey conducted in 1999 2.79 percent of private sector employees were unionized, whereas in state enterprises, 52.6 percent of employees were unionized. Furthermore, only a small minority of employed workers—i.e. an estimated five percent—are covered by collective bargaining agreements.

(ICFTU 2003e)

It is worth noting that none of these countries absolutely forbids workers from organizing and that some have vibrant and growing union movements, notwithstanding the resistance of state and capital (but see Arnold 2004).

*Doing what after Suharto?*

The case of Indonesia is fairly typical of the labor situation in developing countries. Under President Suharto, relevant legislation appeared to be pro-labor. In practice, however, only one pro-government labor union was permitted and all others were banned. Workers were nonetheless very active and often struck against employers—there were almost 200 strikes recorded in 1992—but these took place, for the most part, in individual factories, since national unions were forbidden. Even as the regime began to crumble in the aftermath of the 1997 Asian financial crisis, and notwithstanding Suharto's re-election to the Presidency in 1998, the government continued to suppress trade unions and arrest union officials. This stance changed after Suharto resigned. Under the new government, union activity began to increase substantially. By 2004, there were some 70–100 national trade unions and 11,000 factory unions, covering perhaps 10 million workers (9 percent of the labor force; 25 percent of the formal sector; Arnold 2004; Friedrich Ebert Stiftung 2003). This does not mean that unions now have a free hand to organize; according to the ICFTU (2002a),

The Chairman of the Indonesian Prosperity Trade Union (SBSI), Muchtar Pakpahan, said that relations between government, big business and workers were still tense. Frequently when workers try to set up trade unions, companies either fire or demote union leaders and members, making workers afraid to organize or join a union. Trade unionists also cite a growing number of attacks on their organizers by paramilitary groups supported by the military and police and paid for by employers to intimidate workers or break strikes.

In each of the four countries, the textile and apparel industries employ a substantial number of workers but, in aggregate, they constitute only a fraction of the total labor force. Indonesia follows this pattern (Table 4.6). In 2001, workers in textiles and what is called “wearing apparel” constituted about 9 percent of total employment in “medium and large scale manufacturing,” defined as more than 20 employees per plant, and slightly more than 1 percent of the entire labor force, defined as people over 15 years of age. If the fraction of textile and wearing apparel workers in small and micro establishments is also about 10 percent of the total, then about 1.7 million Indonesians, not quite 2 percent of the total labor force, are employed in this sector. It also seems safe to say that there are no unions at all in the small and micro establishments, and that there are no sectoral trade unions seeking to organize this group of workers.

*Table 4.6* Employment in the Indonesian textile and apparel industry

<i>Sector</i>	<i>1998</i>	<i>1999</i>	<i>2000</i>	<i>2001</i>
Textiles and wearing apparel, no. of medium and large plants	943,810 3,952	1,074,069 4,269	1,114,363 4,285	1,114,893 4,312
Medium and large manufacturing total*	9,933,632 22,368	11,515,955 22,070	11,641,756 22,174	12,086,122 22,648
Small and micro manufacturing total**	Not available	6,116,269 2,514,816	6,291,441 2,598,704	Not available
Total labor force and unemployment rate	92,734,932 5.46%	94,847,178 6.36%	95,650,961 6.08%	98,812,448 8.10%

\* Medium is defined as having 20–99 employees; large as more than 100 employees.

\*\* Small is defined as having 5–19 employees; micro as 1–4 employees.

Source: BPS Statistics Indonesia 2002. Data later than 2001 are not yet available.

What inferences might we derive from these statistics? First, employment in medium and large manufacturing did fall from 1997 to 1998 (data not shown here), although it rebounded in 1999. The general rise in unemployment appears to reflect growth in the labor force rather than contraction in industry. According to another source, however, “up to half the workers in footwear and non-garment textile industries were retrenched” (fired) during the last few years of the 1990s (Symonds 2000). It is also clear that a vast number of underemployed—perhaps several tens of millions—do not appear in the official numbers. Second, notwithstanding the fairly large number of trade union federations and individual syndicates, as noted above no more than about 10 percent of the industrialized labor force is unionized. This suggests that the actual number of workers in the textile and apparel industries who have been able to exercise their right of free association remains quite low. Third, the large pool of reserve labor, combined with government indifference to as well as frequent violations of labor law, greatly complicates broad organizing efforts. The extent to which codes of conduct have, therefore, facilitated union organizing in the textile and apparel sector is difficult to assess but is quite clearly limited. Unionization efforts are further obstructed by the ability of apparel companies to relocate production to countries, such as the People’s Republic of China, where wages are lower and the right to unionize is restricted or even banned.

#### *Doing what in Mexico?*

The extent to which efforts to establish both plant- and industry-wide unions can be delayed, diverted, or defeated is more clearly visible in a specific case from the *maquila* zone on the Mexican side of the border with the United States. As noted above, Mexico has signed the relevant ILO conventions, has passed into law a lengthy labor statute, and is required, under the terms of the North American Free Trade Area’s side agreement on labor, to submit complaints regarding working conditions to adjudication by a binational panel. During 1997 and 1998, however, efforts by workers to unionize in the Han Young factory in Tijuana, a subcontractor building truck chassis for the Hyundai Corporation,

were repeatedly suppressed by management, labor unions associated with the governing Partido Revolucionario Institucional (PRI), and local and state government agencies and officials (Williams 1998, 2000). Despite transnational, cross-border activism and public relations, an independent workers' union was co-opted and the plant was eventually shut down.

In another case, in 2000, involving the Kuk-Dong apparel factory in Puebla, Mexico, workers were able to organize an independent union, but only after strikes and negative publicity for the contracting manufacturer (Quan 2001). As the ICFTU (2002b) reports it,

On January 9, 800 workers at the Korean-owned Kuk Dong clothing factory went on strike to protest the dismissal of five colleagues sacked after complaining about poor wages and conditions, and calling for the right to form an independent union. The workers, some as young as 15, worked 50 hours for \$30 a week. They were prohibited from leaving the factory during their lunch breaks, and many had fallen ill after eating the food in the plant's cafeteria.... The workers occupied the factory for three days. Then on January 11, the 300 workers that had remained overnight at the factory were attacked by State police in full riot gear. The workers, who were unarmed, put up no resistance, but the police beat them with truncheons, so severely that 15 workers had to be taken to hospital for treatment. Two days later, an agreement was reached which enabled the strikers to return to work without reprisals, and the company agreed to distribute copies of the agreement to all the workers. The management then went back on that agreement, and forced some 300 workers to "resign." Under Mexican labour law, a "voluntary" resignation means no severance pay. The company's security guards forced the workers to hand back their copy of the agreement.

Having attracted so much attention by its actions, the factory management subsequently signed a new contract with the union representing workers at the plant, and Nike placed a large order in recognition of "substantial progress at the factory toward Code of Conduct compliance" (Clean Clothes 2002). But similar stories continue to emerge from Mexico and other developing countries.

### *Doing what in Cambodia?*

Governments remain reluctant to use policies such as restrictions on access to national markets as a means of pressuring host states to enforce their existing labor laws. For one thing, this may be found to be in violation of WTO regulations, which allow restrictions for health-related reasons but not on the basis of production methods or conditions. For another, they may have other political objectives to which they give priority. There is, however, at least one case in which labor rights conditionality has been imposed by the United States on one of its trading partners. In 1999, the American embassy in Phnom Penh signed a bilateral textile agreement with the Cambodian government in connection with the import quotas established by the United States under the terms of the Multifibre Arrangement, and subject to the WTO's Agreement on Textiles and Clothing (which

expired on 1 January 2005.)<sup>1</sup> This agreement includes a section which addresses labor standards explicitly (US Department of Commerce 1999), to wit:

The Royal Government of Cambodia shall support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law.

The Government of the United States and the Royal Government of Cambodia shall conduct not less than two consultations during each Agreement Year to discuss labor standards, specific benchmarks, and the implementation of this program.

The agreement further links labor practices to the quota, as follows:

Based on these consultations and other information regarding the implementation of this program and its results, the Government of the United States will make a determination by December 1 of each Agreement Period, beginning on December 1 1999, whether working conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards. If the United States makes a positive determination, then the Specific Limits as set forth in paragraph 4 and Annex B shall be increased by 14 percent for the Agreement Year following such certification. The increase will be in addition to the annual growth provided for in Annex B. Any increase granted under this paragraph will remain in effect for a subsequent Agreement Year if and only if the United States makes a positive determination by December 1 of the previous Agreement Year. Moreover, if the United States Government determines that, subsequent to an affirmative determination, the Royal Government of Cambodia has taken or has failed to take major action resulting in a significant change in working conditions, then the Government of the United States may withdraw such an increase.

As a consequence of this agreement, in May 2000 the Cambodian government, the Garment Manufacturers Association of Cambodia, and the International Labour Organization agreed to establish a project to monitor working conditions in the apparel industry. The United States then increased Cambodia's textile import quota by 5 percent, as stipulated in the original agreement (USTR 2001). At the end of December 2001, the bilateral textile agreement was extended through the end of 2004, and a further 9 percent increase in the import quota was added (American Embassy 2002).

The ILO project involves a monitoring system in 211 Cambodian garment factories. In operation since 2001, and extended once, it is based on consultations and agreements with "the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY), the Garment Manufacturers Association in Cambodia (GMAC), the Cambodian trade union movement and the United States," with funding primarily from the United States. Registration with the system is voluntary, but "encouraged by a Prakas issued by the Ministry of Commerce which indicates that only

registered factories would be eligible to use allocated export quotas and/or buy export quotas through official bidding for the export of textiles to the USA” (ILO 2004c).

Registration consists of the signing of a Memorandum of Understanding (MOU) between the ILO and the participating factory. The MOU outlines the duties and responsibilities of both parties. Under the MOU the factory undertakes, inter alia, to provide full access to ILO monitors to factory premises, allow ILO monitors to interact freely with shop stewards, union representatives and factory workers, both inside and outside factory premises, and provide such access in case of both announced and unannounced monitoring visits.

As of April 2004, there were 11 monitors visiting factories using a checklist of 156 questions “most of which relate to articles in the labour code and its implementing regulations and/or provisions in the relevant ILO Conventions” (ILO 2004c).

The “Eighth Synthesis Report” (ILO 2004c) on working conditions in the Cambodian garment sector provides the following findings from surveys of 62 factories:

- There is no evidence of forced labour;
- There are two incidents of sex discrimination including 1 minor incident of sexual harassment;
- There are four minor incidents and two more serious incidents of child labour;
- There has been improvement in the correct payment of wages though this remains a problem in a number of factories;
- There has been some improvement with regard to ensuring that overtime work is undertaken voluntarily though this remains a problem in a number of factories;
- There has been some improvement in ensuring that overtime hours are within legal limits though this remains a problem in a number of factories;
- There has been some improvement in ensuring freedom of association, including protection against anti-union discrimination, though this remains a problem in a small number of factories;
- There has been some improvement in ensuring that strikes are organized in conformity with the legally required procedures.

The ICFTU is rather more critical of conditions in the Cambodian textile industry, pointing out that a living wage is the local equivalent of \$80, while the minimum wage in the sector is \$45 (ICFTU 2004:1–2). The result is that workers are more or less compelled to work overtime, not infrequently longer than the law permits. Nevertheless, a job in the textile industry is highly desirable, given the growing privatization of arable land in the countryside and in-migration to cities and towns (especially Phnom Penh).

### *Doing what in Jordan?*

No other bilateral textile agreement concluded between the United States and its trading partners includes such provisions or has led to a similar monitoring program, according to information provided by the US Trade Compliance Center (US TCC, n.d.). The free trade agreement between the United States and Jordan, signed in October 2000, does, however,

stipulate that both countries will enforce their own domestic labor and environmental laws. According to that agreement (White House 2001; see also US TCC 2000: Article 6),

These provisions will not require either country to adopt any new labor or environmental laws, and each country retains the right to set its own labor and environmental standards and to change those standards. As part of the agreement, the two countries affirm the importance of not waiving or derogating from their labor or environmental laws in order to encourage trade, and commit to effective enforcement of their domestic labor and environmental laws.

Under the terms of the agreement,

If one country fails to do so [i.e. enforce its own laws], the other can ask a neutral international panel to review the situation, and if such a failure is found, the complaining country can deny certain trade benefits or take other appropriate steps to bring the offending country into compliance with its labor and environmental commitments. (Polaski 2002)

According to some (e.g. Polaski 2002), this should be a model for future free trade agreements between the United States and other countries. But it ought to be recognized that such stipulations hardly reflect symmetrical power relations. It is quite improbable that Jordan will ever pressure the United States to hew more closely to its environmental and labor laws (or commitments made under international law).

The evidence provided above points only to limited spillover, at best, and does not really say anything about general trends in the five countries or anywhere else. Paradoxically, the greatest degree of impact appears to have occurred in the poorest of the five countries, Cambodia, where an intergovernmental agreement compelled the establishment of a monitoring program. Even so, the small number of inspectors and the large number of textile factories<sup>2</sup> mean that violations of labor law are common and generally committed with impunity. Perhaps it is too soon to come to conclusions about the broader political impacts and effectiveness of campaigns, codes, and corporate responsibility; still, it would appear that the hopes many have invested in private regulation have yet to be fulfilled.

### **What is being done, anyway?**

The purpose of the research trip to Asia was to gain a better sense of trends in workers' rights and to inquire whether codes of conduct, in particular, were having any spillover effects (Lipschutz 2004b).<sup>3</sup> During that trip, researchers conducted 39 interviews with representatives of government ministries, international organizations, trade unions, and local and transnational nongovernmental organizations (not all of these were linked to the apparel industry). They were unstructured and open-ended, although each was organized



around a set of specific questions. Most of the interviews were an hour in length. Among the conclusions drawn from this fieldwork were the following:

1 Corporate codes of conduct at the factory level are:

- most influential symbolically, providing an opening for mobilization by helping to persuade workers that future improvements are possible;
- occasionally used as a bargaining tool in labor negotiations, inducing concessions by management fearful of outside involvement;
- a source of support for worker resolve, especially in cases where companies openly fail to honour their publicized pledges and workers believe that the force of conscience can be used to their advantage;
- not a barrier to corruption, which remains a major problem, especially in the context of widespread bribery and nepotism, as well as notoriously poor monitoring of violations; and
- a potential threat to the jobs of low-paid workers under conditions of high unemployment, inasmuch as improved labor standards mean little to those who are faced with the loss of their only source of income.

2 So far as the nature and extent of “spillover” effects were concerned:

- In theory, the ratification of international conventions means that countries are required to respect them but, in practice, such endorsements carry very little weight.
- The wider labor force and community remain unaffected by changes to specific workplace rules, inasmuch as their limited force does not extend beyond the walls of the local factory.
- In contravention of International Labour Organization conventions, union rights are heavily restricted by government authorities; efforts to organize unions are frequently met with resistance, while legal protests in state-run industries are usually halted violently by police.
- Contempt for the domestic rule of law remains pervasive, as existing regulations are ignored by state authorities and worker grievances are summarily dismissed.
- The potential for social unrest in conditions of rising unemployment encourages national governments to prioritize job creation, with quantity trumping quality.

3 Where relations between transnational NGOs and local trade unions were involved:

- Care-taking interventions do not help to raise the consciousness of workers or to demonstrate the merits of self-leadership; in the interests of long-term change, there must be a greater focus on empowerment.
- Inasmuch as a preoccupation with conditions in the workplace can lead to neglect of such critical issues as education, health, and safety, unions want NGO training and assistance to foster an overall improvement in workers’ quality of life.
- NGOs too often view trade unions only as mediators, whereas they are, in fact, a promising source of strength for workers whose greatest weaknesses are the lack of a unified voice and limited organization.
- While many transnational NGOs are deeply sceptical of international conventions whose enforcement lies in the hands of particular states, the unions themselves

believe that the future of effective labor regulations is to be found at the national level.

- The distributive inequalities that are linked to globalization (and justifiably condemned by NGOs) are frequently ignored by national unions whose particular mandates and bounded constituencies blind them to the regional nature of their struggles. Potential allies in a fight for social, political, and economic rights (groups of exploited workers in neighbouring countries) are often working at cross-purposes, viewing one another as competitors in a zero-sum game in which the unfavorable terms—as decided upon by major corporations—are wholly non-negotiable.

On the basis of information gathered during these interviews, only limited signs of spillover were apparent. Locally, there was found to be broad awareness that, notwithstanding transnational campaigns and activism, the basis for effective labor law lies within states and in the willingness and ability of political authorities to ensure observance of that law. Consequently, activists and campaigners ought to focus on improving legal, political, and social conditions for workers in the host countries, in addition to trying to affect the behaviour of transnational corporations through consumer pressure and corporate good behaviour. Despite the pressures of international economic competition, the fight for workers' rights is always a political one, and what is required is greater interaction between global civil society, *national* trade unions, and *national* politics. There are some indications that this is beginning to happen, especially as unions in the North come to realize that their survival depends not on protectionism but alliances with workers in the South.

There are a few examples of this. In 1997, the AFL-CIO reconstituted the American Institute for Free Labor Development (AIFLD) into the American Center for International Labor Solidarity (the "Solidarity Center"). AIFLD had operated as an international vanguard of the United States' Cold War strategy, building alliances with the CIA, working against leftist unions, and supporting repressive governments (Rodberg 2001). By contrast, the Solidarity Center, with offices in 25 countries, is active in some 60 countries. According to its web site, the Center offers "education programs [that] feature training in basic human and worker rights, union skills, advocacy, occupational safety and health, economic literacy, and civic and voter education...designed for workers, unions, and community organizations in developing societies, particularly those seeking to promote democracy and play an essential role in creating public policies in their countries" (Solidarity Center n.d.). The Center still receives about \$15 million a year in US government support, and is not entirely independent, but works much more closely with unions and on their behalf.

What the Solidarity Center and other civil society groups do not appear to do is to join directly in efforts to instantiate the legal and broad cultural basis for enforcement and observance of workers' rights. This is, obviously, a much more complicated proposition than providing education and training aimed at union organizing: it requires long-term social struggles directed toward changing the political economy of domestic power relations. To take the case of Mexico as an example, for decades unions were allied with the ruling Partido Revolucionario Institucional (PRI), and were little interested in challenging the social structures and laws that provided them with access to resources or in empowering the working class. Vicente Fox's election to Mexico's Presidency in

2000, under the banner of the Partido Acción Nacional (PAN) did little to change this pattern and could only be seen as a victory for business, both domestic and foreign, which was uninterested in strengthening workers' rights. Changes in governing parties might be necessary to accomplish the kinds of structural changes required for meaningful implementation and protection of rights of all kinds, but that is not sufficient. A constitutive politics is necessary. While the specific conditions under which this might take place differ from one country to the next (and I include the United States in this list), there are very real constraints on what can be accomplished in the absence of a reconstitution of the political (see e.g. Solidarity Center 2003a: 18–19, 2003b:36–7).

### **Who can do it?**

Since the end of World War II, states have largely given up their sovereign right to place restrictions on the activities of domestic capital and foreign investment. So long as goods and services were produced within countries by home companies for domestic consumption only, a state could, at least in theory, exercise control over the freedom and mobility of capital. That goods might be exported to foreign markets did not affect this relationship, so long as the state retained the authority to structure the national political economy. Today, not only is capital footloose, in that it can choose where it is going to set up shop, but it has also acquired a set of implicit and explicit transnational rights—which were to be codified in the stillborn Multilateral Agreement on Investment, and which are now being implemented through other means—that provide corporations with a form of producer sovereignty that frequently trumps national sovereignty. This has been accompanied by a secular decline in both the power and authority of labor unions as well as in their positioning among the vanguard of those social forces that constitute “ethical” practice within societies (see Chapters 7 and 8).

As Pearson and Seyfang (2001:51) point out,

The current wave of voluntary codes [of conduct] has emerged from the rise and fall of statutory codes. These come from the previous international institutional architecture...[which] also embodied the (then) new voice of organized labour as a key actor in international and intranational political and economic policy dialogue.... However, in the last 20 years, there has been a significant decline in the political acceptability of strong institutional standards. The 1980s witnessed a rise in neo-liberal social policy...accompanied by labour market deregulation, and in particular restrictions on collective bargaining.

The always-limited and declining authority of the ILO—which, in any event, lacks effective monitoring and enforcement powers—has not been taken up by any other international agency, such as the World Trade Organization. It seems unlikely, moreover, that the WTO will become an international forum within which labor and environmental standards are to be addressed. There is, in addition, justified concern that international agencies have the interests of capital at heart and increases in “labor productivity” and “flexibility” as goals. This has mostly to do with the legal right of corporations to hire

contract labor, rather than union workers, because the former cost less, cannot bargain over terms of employment, and are easier to lay off (Arnold 2004). The results are lower production costs and higher profits, as companies pay only for as much labor time as they need, without the burden of benefits.

In the absence of either effective international or national regulation, those who wish to see implementation of workers' rights and labor standards are left with essentially two options: action through the market or mobilization within states. Activist campaigns and codes seek to use markets as a means of restraining producer sovereignty and attempt, through market mechanisms, to accomplish political ends. BJ. Bullert (2000a:1) argues that "an emerging form of political activism has been taking shape [through these campaigns] suited to computersavvy youth and life-style politics...." Yet, there are fundamental structural problems with both the claim and the tactics, the most serious of which is that the market cannot be used to create the kinds of *political* rights and rules of concern. In other words, absent the political conditions within countries in support of workers' rights, consumer choice is a thin reed on which to supply them.

The impacts of these campaigns are both controversial and uncertain. Some critics argue that social regulatory standards are a "cultural" feature of specific societies and should not be subject to global harmonization. Some economists point out that labor regulation would reduce the attractiveness of host countries and increase unemployment. Some corporations resent being ordered around by consumers. But even supporters of campaigns and codes find much to be desired in the consequences of civil society pressures on apparel companies. Many subcontractors have begun to set up model factories, in which the work environment and wages are quite attractive, and to which visitors can be taken, while down the road other plants operate under appalling conditions. Unions are not universally happy about NGO and civil society involvement, either; as the Solidarity Center (2003c:225) has observed,

Many trade unionists suspect that behind corporate and NGO enthusiasm for codes of conduct and related monitoring plans is an agenda aimed at replacing altogether the bargaining and representational role of trade unions and their effectiveness in the political arena. Some see the real goal of corporate backers of codes of conduct as the destruction of strong, classbased workers' organizations that can organize and bargain and back up their demands with the power to strike. In their place would be scattered, small, resource starved NGO monitors whose only clout would lie in ad hoc public relations campaigns that would soon be ignored by consumers. Further, some critics believe that the ultimate corporate goal is to replace not only legitimate collective bargaining, but also labor law, with non-enforceable standards.

As the existence of sweatshops in the United States makes clear (Bonacich and Appelbaum 2000), even a country with relatively robust labor legislation and a history of strong apparel and textile unions may choose, in response to the competitive pressures of globalization, to engage in selective enforcement of those laws and decide to not allocate the resources necessary to their enforcement. Both producers and policymakers, whether in the United States or other industrialized countries, argue that the market necessitates

such conditions and that, were laws to be fully enforced, the jobs provided by such enterprises would be lost to overseas production. It is hardly to be expected that countries lacking both resources and histories of unionization will eagerly protect the rights of their workers. And, when the costs of labor represent a small fraction of the final retail price of a consumer good for which there is considerable demand, it is hardly to be expected that any corporation will seek to kill the geese that lay the golden eggs.

Naomi Klein (2000:434) has put the pessimistic view best when she writes:

There is no doubt that companies like Nike have learned that labor-rights abuses can cost them. But the spotlight being shined on these companies is both roving and random: it is able to shine down on a few corners of the global production line, but darkness still shrouds the rest. Human rights, far from being protected by this process, are selectively respected: reforms seem to be implemented solely on the basis of where the spotlight's beam was last directed. There is absolutely no evidence that any of this reform activity is coalescing into a universal standard of ethical corporate behavior that will be applied around the world, and no system of universal enforcement is on the horizon.

Of course, if Nike's implementation of its Code of Conduct in, for example, Vietnam leads all other apparel factories to adopt codes, with the government of Vietnam monitoring and enforcing them, and manufacturers choosing not to relocate elsewhere, some degree of social regulation will have been established. Nonetheless, at the end of the day, corporate activity is limited in what it can accomplish while enforcement of labor law will remain largely within the purview of national governments, who want little to do with social activism. Such a conclusion suggests even more strongly that the state must be central to the reduction and elimination of social and environmental externalities, for only the state has the power, legitimacy, and authority to regulate market activities. What kind of state matters, of course. This is a point to which I will return in the final part of this book.

### Notes

- 1 The WTO's Agreement on Textiles and Clothing, which addresses export and import quotas for textiles, expired on 1 January 2005. As a result, quotas originally established under the earlier Multifibre Arrangement have been fully abolished and trade in textiles and clothing is now fully liberalized. This means, in effect, that the largest and lowest cost producer, which is currently the People's Republic of China, will dominate the market, as has already been seen in trade statistics for the first half of 2005. How this will affect Cambodia remains to be seen (for a brief summary, see *Global Trade Negotiations* 2004).
- 2 The textile industry's share of Cambodia's exports rose from 8 percent in 1995 to 96.5 percent in 2002, while clothes exports to the United States rose from \$600,000 to \$953.3 million over the same period (ICFTU 2004:5).
- 3 David Newstone, currently a Ph.D. candidate in Political Science at the University of Chicago, and Michael Blackburn assisted or conducted interviews in all four countries. My profound thanks to them for their work and efforts.

## 5

# Paper or plastic? The privatization of global forestry regulation

The subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis.

UNCED Statement on Forest Principles (1992)

### Introduction

In 1992, representatives of 180 of the world's nations met in Rio de Janeiro at the UN Conference on Environment and Development. Among the submissions debated and considered at the "Earth Summit," as it was called, was one addressing sustainable forestry, with the unwieldy title "Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests" (UNCED 1992). This proto-convention was the result of several years of sustained, intensive negotiation and controversy and a product of growing concern during the 1980s and early 1990s about the future of the world's remaining tropical forests (Hecht and Cockburn 1990).

That the Earth Summit was taking place in Brazil was especially apposite, for two reasons. On the one hand, the burning forests of Amazonia had, during the late 1980s, served to focus global attention on their survival as well as their role in the global environment, especially the carbon cycle. On the other hand, the Brazilian government was strongly opposed to any hint of internationalization of its sovereign resources and territory (for background, see e.g. Goodman and Hall 1990; Schmink and Wood 1992; Fogel 2002: ch. 3). Opposition to the Forest Principles was much broader than support for them, and they crashed and burned. Over the intervening years, there have been repeated efforts to launch an International Forest Convention; although UN-sponsored panels, commissions, and forums on forests have worked continuously on the matter since 1995, these efforts have, so far, not been consummated in either an agreement or an organization.

The absence of a global forestry convention does not mean the absence of "international" forestry regulations, although these, for the most part, have their origins in long-standing national legal and regulatory systems. Indeed, examination of national forest regimes suggests that virtually all contemporary forest management systems have been derived from principles and practices developed during the eighteenth and nineteenth centuries in those regions that would eventually become Germany. Subsequently, these were revised and adopted by France, Britain, and the United States and later diffused throughout European colonial territories (Scott 1998; see also Schama 1995; Peluso 1992). In all instances, national systems were implemented as the "best available approach" to forest management, even though subsequent experience showed

them to suffer from serious shortcomings. Inasmuch as these management techniques were intended for purposes not of forest preservation but, rather, of conservation and commodification of timber resources (e.g. Hays 1980), it is not surprising that there has been considerable resistance to a global forestry convention that might emphasize protection over exploitation. Timber companies are fearful that they will be denied access to forests; activists worry that forests will nonetheless be ravaged; states are concerned about intrusions on their sovereignty. And really existing institutions and practices are sticky and difficult to change.

But why regulate forestry practices at all? Here, we encounter the tension between forests as “capital on the hoof,” so to speak, and forests as providers of “natural services.” Aside from the intrinsic ecological value of the various species of trees themselves, forests serve a variety of ecological functions, providing habitat for other plant and animal species, environmental services such as water purification, soil retention, local climate moderation, and carbon sequestration (with the last being especially important for global climate), and as reservoirs of genetic diversity. These services are not provided in equal measure by forests managed purely for timber growth, and the rate of destruction of non-managed forests, especially in tropical regions, is by all accounts very high (FAO 2001). If the preservation of forests is essential to the viability of life on earth, there is, in other words, a global public interest in seeing that they are treated in a sustainable manner.

While a number of the ecological functions listed above might arguably fall into the category of global commons, as suggested by the Convention on Biological Diversity (CBD), none of these are as central to the political economy of states and markets as production of timber and conversion of land. While sovereignty considerations do enter into questions such as access to genetic resources, only nominal limits to access are addressed in the CBD and related agreements. Neither considerations of sovereignty nor global commons appear especially relevant to any of the other secondary benefits provided by forests. For the time being, these natural services might be thought of as positive externalities for which no one pays but from which everyone benefits. In political terms, then, concentrated economic stakes and the maintenance of national control of forests far outweigh the diffuse and scattered interests that the world might have in the secondary benefits of sustainable forests.

Despite the best efforts of concerned governments, some of which have called repeatedly for an international forestry convention (Canada having been among the most voluble in this regard), one result of the apparent international impasse has been the growing privatization of global forestry regulation. As indicated in earlier chapters, there is nothing new about private law, either domestic or international. But, whereas private law was, historically, constituted by contract among signatories (Braithwaite and Drahos 2000; Cutler 2003), and is now legitimated and maintained through ratification and enforcement by states, the private forestry regulation discussed in this chapter, like the attempts to address labor rights in the apparel industry, rests on hopes for some type of “social contract” between producers and consumers promising loyalty by the latter in return for corporate good behavior.

The number of privatized regulatory forest projects is considerable and, in many ways, the stakes are higher here than in the apparel industry. Forests have, historically, been subject to considerable state management, if only because, until the mid-nineteenth

century, timber played a major role in military as well as economic affairs, especially in the construction of warships. Forests were often the property of kings and aristocrats, who were zealous about protecting them, and governments regarded forests as integral to projects of national development. Finally, forests occupy national territory and continue to be regarded as sovereign resources and state property (Kuehls 1996). As a result, there is considerable competition among the various private forestry codes on offer, for the one that is most widely adopted and accepted by both consumers and producers could well acquire a monopoly position in the market for such regulation and become the basis for an eventual international forestry law.

This chapter begins with a more detailed examination of the failure to achieve a global forestry convention during the 1990s. As we shall see, one key obstacle to such an agreement was to be found not so much in conflict over fundamental principles as in the political economies of *national* forest management approaches, which are historically rooted, materially based institutions that are not easily addressed or changed through international law. In the second part of the chapter, I turn to a discussion of the many initiatives to implement private forestry regulation, and the ways in which market-based methods lie at their core. I focus here on three particular initiatives: the Forest Stewardship Council (FSC), ISO-14000 of the International Organization for Standardization (ISO), and systems for mutual recognition of national forestry regulations. I then address evaluations of the effectiveness of these private regulatory projects and ask whether the sovereign consumer, when faced with contradictory messages about her purchases in the market and, possibly, unmotivated by normative concerns, is necessarily going to choose an environmentally friendlier product.

### **The political economy of forests**

It is a commonplace, in this era of almost-instantaneous communication, to argue that the diffusion of both knowledge and practice is more widespread than ever before (see e.g. Castells 1996, 1997, 1998). Successful practices—if they are not proprietary—attract attention and are replicated by people living in other places far removed from their point of origin. But as attested by the diffusion of agriculture throughout the world 10,000 years ago, there is nothing very new about such social imitation. What *has* changed is the velocity with which communication takes place, and the concomitant contraction of space involved. Hence, it is hardly surprising that there are a limited number of templates for forestry management in place around the world. Nor is it unexpected that these templates originated mostly in Europe, where sovereigns and states were best organized to deploy regulation. Just as the organizational principles of European states converged on a few forms, so did the management of forests and other natural resources.

The basic elements of contemporary forestry originate primarily from practices developed by state authorities in Prussia and Saxony during the eighteenth century, in response to a growing shortage of wood. These were adapted subsequently for application elsewhere. As James Scott (1998) has described it, “scientific” forestry was based on the precise measurement of the distribution and volume of wood in a given parcel, the systematic felling of trees, and their replacement by standard, carefully aligned rows of mono-cultural plantations that could be harvested at set times. According



to Scott (1998:19–20), this approach succeeded beyond expectations during the first harvest cycle of 80 years or so, but began to fail during the second as a result of unforeseen ecosystemic damage and destruction. No matter—by then, the model had been adopted around the world as the law and practice of many lands.

What is worth noting about scientific management of forests is that its goal was not preservation, or “sustainable development,” in the sense that we understand those practices today. Rather, as Scott (1998:11–12) has observed, the goal was entirely economic:

The early modern European state, even before the development of scientific forestry, viewed its forests primarily through the fiscal lens of revenue needs. To be sure, other concerns—such as timber for shipping, state construction, and fuel for the economic security of its subjects—were not entirely absent from official management. These concerns also had heavy implications for state revenue and security. Exaggerating only slightly, one might say that the crown’s interest in forests was resolved through its fiscal lens into a single number: the revenue yield of the timber that might be extracted annually.

In each instance, management was overseen by state authorities whose objective was maximizing production in the national “interest.” Specific practices differed, of course, from one country to the next (compare Hays 1980; Peluso 1992; Schama 1995). For example, even though most forest land in the United States and Canada was and remains privately owned, a considerable amount is held by the state as “public commons” but systematically leased to private timber producers. In nineteenth-century India, the British Raj took ownership of virtually all forests, declaring them to be “wasteland” and having no owners (Guha 2000), a practice continued today by the government of India. Interestingly, forestry policy in the Raj was based on French and German practices that, in turn, were eventually applied throughout the United Kingdom (e.g. Oosthoek 1999). In Indonesia, forests are state-owned but, in practice, treated as private property while, in Brazil, the lack of national government capacity has literally rendered Amazonia’s forests an unregulated open-access commons.

In all cases, however, public forests have been viewed as a *national* resource, that is, the sovereign property of the state. In this role, the conservation of forests is tightly linked to the production of timber and other commodities that generate both capital and jobs, and the economies of large regions have become almost wholly dependent on natural resource production from those forests (e.g. Magnusson and Shaw 2003). Moreover, in the domestic scheme of things timber producers can be politically influential and often get their way (although this is changing; see, for example, Lipschutz and Mayer 1993; Lipschutz 1996: ch. 4; Dauvergne 2001). In this respect, forestry regulation differs significantly from efforts to protect other elements of the Earth’s environment, such as oceans and atmosphere, which have been defined as global commons and have, consequently, been made subject to regulation through international conventions (Soroos 1997; Buck 1998). Because forests are, in effect, *private* resources whose market value is easily determined, there is considerable reluctance to give away

any of that value in pursuit of some poorly defined global good whose benefits are widely spread and difficult to quantify.

If we look at these different issues more closely, *why* forests are different may become clearer. The point at which each portion of the natural environment becomes subject to international regulation is, for the most part, that one at which the balance of interests and costs tilt clearly toward a public solution (“public” in the international sense). Moreover, a public solution is most easily negotiated when there is already in place a template or framework within which a new issue can be addressed. For example, although the Basel Convention and other agreements on the international movement of toxics are intended, in part, to encourage source reduction, their control mechanisms rely largely on the regulation of trade in toxic wastes (O’Neill 2000; Clapp 2001). The same is true for the ozone agreements, the Convention on Trade in Endangered Species, and even the CBD. There already exists a well-developed framework for treating international trade as a heavily regulated public good through the General Agreement on Tariffs and Trade and the World Trade Organization, the North American Free Trade Agreement, the European Union, and other such bilateral and multilateral agreements and institutions. (It is one of the rhetorical paradoxes of “free trade” that it is so heavily regulated at the international level, which, from the national perspective, renders such law invisible and makes it appear as though no political intervention is taking place; see Ruggie 1982, 1991, 1995; Vogel 1996). Hence, those bads whose substance or effects are transmitted through international commerce are also those for which global regulation seems to be most easily achieved (although I do not consider here whether such agreements achieve their stated goals; on the topic of effectiveness, see Bryner 1997; Kütting 2000; Miles *et al* 2002).

By contrast, those environmental bads whose substance or impacts are not easily amenable to management through a trade regime, such as climate change, are proving to be much more difficult to address at the international level (though not for lack of trying). The production of greenhouse gases is intimately involved with everyday life, and there is little willingness on the part of political authorities or capital holders to limit trade in or production of the goods (fuel, food, fiber) that give rise to the bads. The political economy of greenhouse gas production is so much a part of modern industrial life that resistance to regulation is already intense, even as, in the face of accumulating evidence of global climate change, there are no effective restrictions in place at any level. The emerging solution to this impasse has thus been to transform climate change into a trade matter through markets in tradable emission permits, and to leave the difficulties of implementation to the states themselves. While we might expect such a permit system to work smoothly once it is in place, whether national efforts to control emissions will be effective is anybody’s guess.<sup>1</sup>

Forests have similar characteristics. Ecological functions are not amenable to exchange whereas commodities are. As might be expected in such a case, therefore, international efforts to regulate forestry practices have come to rest largely on the tools of trade. For better or worse, however, both international trade lawyers and the advocates of free trade are skeptical of such international regulation. First, public international forestry law would mandate some degree of harmonization of forestry practices yet, just as in the case of labor law, free trade advocates generally argue that this would amount to a form of “cultural imperialism.” They are, therefore, opposed to the inclusion of environmental

regulations in trade agreements (Bhagwati 1993, 2002, 2004). Second, in the absence of such harmonization, individual states find themselves in a weak position from which to impose their own municipal standards on forestry imports as part of an effort to encourage more sustainable practices in the country of origin. Such restrictions are likely to be judged as a violation of WTO rules that forbid process standards as non-tariff barriers to trade (see e.g. Mayer and Hoch 1993), while countries with lower levels of regulation might also be able to offer timber at lower cost. These reasons, among others, are why the agreement presented at the Rio Earth Summit was characterized as “Forestry Principles,” rather than as a binding convention; as principles, countries could choose to follow them or not. Most have chosen not to. Countries can impose their own domestic standards but these are likely to increase variable costs to producers; paradoxically, perhaps, timber producers in high-cost countries such as Canada wish to remain competitive and demand international harmonization so that all countries must impose the same costs (see e.g. Barron 1997).

The resulting lacuna has motivated efforts by both activists and business to find alternative means of regulating forest practices at the global level. Timber company brands are hardly as ubiquitous as those of clothing manufacturers, with the result that consumer awareness is a less-powerful lever with which to move capital. At the same time, however, “do-it-yourself” (DIY) remodeling has become ever more popular—sales by home improvement stores in the United States alone approach \$300 billion per year, a sizable fraction of which is lumber. The global market structure of the timber trade is quite fragmented, as well, inasmuch as producers tend to be national. Activists have chosen, therefore, to pursue a double-pronged strategy. As in the case of the apparel industry, activists are putting pressure on retailers and DIY stores in Europe and North America, demanding that they sell only sustainably produced lumber and inform consumers that they are doing so. Demand from these retailers, it is hoped, will induce wholesalers and producers to seek sustainable timber for sale to contractors and do-it-yourselfers. But many timber companies and governments are reluctant to hop on activist bandwagons, regarding those standards as being too high. Consequently the forestry equivalents of corporate codes of conduct are also on offer.

### **International trends in forestry regulation**

Although forestry management has been an “internationalized” activity for more than two centuries, it is only over the past two decades that serious international attention has been paid to the externalities generated by conventional forestry practices. As defined in the 1993 Helsinki Declaration of the Ministerial Conference on the Protection of Forests in Europe (*International Trade Forum* 2002), sustainable forest management (SFM) is:

the stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfill, now and in the future, relevant ecological, economic and social functions, at local, national and global levels, and that does not cause damage to other ecosystems.

*Table 5.1* Institutional form of sustainable forestry regulation

<i>Political</i>	<i>Economic</i>
<i>Public Interstate</i>	<i>Activist</i>
UNCED Forestry Principles	Forest Stewardship Council
<i>Private Transnational</i>	<i>Association</i>
Int'l Forestry Industry Roundtable ISO-14001	

*Table 5.2* Selected national and global initiatives in sustainable forestry management

<i>Name</i>	<i>Membership</i>		<i>Objective</i>
	<i>NGOs</i>	<i>States Corp.</i>	
Kyoto Protocol		✓	Establish terms and conditions to meet provisions of Kyoto Protocol regarding management of forests and their role as carbon sinks.
Intergovernmental Working Group on Global Forests (1993–94)		✓	Created to develop a scientifically based framework of criteria and indicators for the conservation, management, and sustainable development of boreal and temperate forests.
UN Intergovernmental Panel on Forests (IPF) (1995–97)		✓	Created by the UN Commission on Sustainable Development as an open-ended ad hoc group to pursue consensus and coordinate proposals to support the management, conservation, and sustainable development of forests.
Intergovernmental Forum on Forests (IFF) (1997–2000)		✓	Follow-up to the IPF created by ECOSOC to pursue further proposals for action to governments, international organizations, private sector entities and all other major groups on how further to develop, implement and coordinate national and international policies on sustainable forest management.
UN Forum on Forests (UNFF) (2000–present) ( <a href="http://www.un.org/esa/forests/">www.un.org/esa/forests/</a> )		✓	Created as the permanent intergovernmental body responsible for overseeing the implementation of the IPF/IFF Proposals for Action and enhancing cooperation and international forest policy dialogue.
International Tropical Timber Organization (1985–present) ( <a href="http://www.itto.or.jp/">http://www.itto.or.jp/</a> )	observers ✓	observers	Created in 1985 to provide international reference document upon which more detailed national

<i>Name</i>	<i>Membership</i>		<i>Objective</i>
	<i>NGOs</i>	<i>States Corp.</i>	
Center for Int'l Forestry Research (CIFOR)	✓	✓	Established to improve the scientific basis for ensuring the balanced management of forests and forest lands; develop policies and technologies for sustainable use and management of forest goods and services.
International Organisation for Standardisation ISO-14001 ( <a href="http://www.iso.ch/">http://www.iso.ch/</a> )		✓	ISO series provides a framework for an organization to use to identify and address the significant environmental aspects and related impacts of its activities, products, and services.
World Commission on Forests and Sustainable Development (1996–99)	✓	✓	Independent commission which held hearings to achieve policy reforms aimed at reconciling economic and environmental objectives for sustainable management of global forests.
Rainforest Action Network ( <a href="http://www.ran.org/">http://www.ran.org/</a> )	✓		“Old Growth Campaign” promotes consumer boycotts of companies that log and sell products from old growth forests.
Smart Wood (1989-present) ( <a href="http://www.smartwood.org/">http://www.smartwood.org/</a> )	✓		Established by the Rainforest Alliance to provide certification to all types of operations in all types of forests. FSC accredited.
Forest Stewardship Council (FSC) <a href="http://www.fsc.org/">http://www.fsc.org/</a>	✓	✓	Created in 1993 to establish internationally recognized principles and criteria of forest management as a basis for accrediting regional certifiers.
Scientific Certification Systems (Oakland, CA) <a href="http://www.scs1.com/forestry.shtml">www.scs1.com/forestry.shtml</a>			Private firm “Forest Conservation Program” evaluates forest management against objective and regionally appropriate principles of sustainable forestry; FSC certified.

standards could be developed to guide sustainable management of natural tropical forests.

SGS Qualifor (Oxford, UK) <a href="http://www.qualifor.com/">http://www.qualifor.com/</a>		Private firm	“Carbon Offset Verification Service” assesses, surveys, monitors and certifies project development and management.
Programme for the Endorsement of Forest Certification (1999-present) <a href="http://www.pefc.org/">http://www.pefc.org/</a>		✓	Created to provide certification of forests according to the Pan-European Criteria as defined by the resolutions of the Helsinki and Lisbon Ministerial Conferences of
<i>Name</i>		<i>Membership</i>	<i>Objective</i>
		<i>NGOs</i>	<i>States Corp.</i>
Sustainable Forestry Initiative (1995-present) ( <a href="http://www.aboutsfi.org/">http://www.aboutsfi.org/</a> )		✓	1993 and 1998 on the Protection of Forests in Europe. Established by American Forest and Paper Association to provide standard of environmental principles, objectives and performance measures that integrates growing and harvesting of trees with the protection of wildlife, plants, soil and water quality, and other conservation goals for int’l application.
African Timber Organisation		✓	Pan-African timber trade organization with 13 member countries developing standards for sustainable forest management that could form eventual basis for certification program.
Malaysian National Timber Certification Council ( <a href="http://www.mtcc.com.my/">http://www.mtcc.com.my/</a> )		✓	Quango established to administer voluntary third party certification of forests in Malaysia. Cooperates with FSC.
Lembaga Ekolabel Indonesia (1998-present) ( <a href="http://www.lei.or.id/">http://www.lei.or.id/</a> )	✓		Certifying organization for Indonesian forests. Works in cooperation with FSC.
International Forest Industry Roundtable		✓	Proposal for an international mutual

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<p>The BMZ/GTZ Forest Certification Project www.gtz.de/ forest certification</p>	<p>✓</p>	<p>recognition framework for national forest certification programs is in the works. German government-owned corporation which provides training and support for information, capacity building, participation, and networking for better communication and cooperation of those involved in certification processes.</p>
<p>Initiative zur Förderung nachhaltiger Waldbewirtschaftung (IFW)</p>	<p>✓</p>	<p>Dual process of certification whereby nationally accredited bodies within timber exporting nations would certify that producers have met high standards of forest management for European label.</p>

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Sources: Evans 1996; CIFOR n.d.; SGS n.d.; IISD 2003; UN Forum on Forests 2004; and other forestry web sites.

As is the case with the apparel industry, efforts and projects to regulate forestry fall into several different categories, as shown in Table 5.1. Many of the projects listed in Table 5.2 seek to regulate economic activities through *certification*. There are three types of product certification. *First party* labeling, the most common and simplest approach, entails producer claims about a product, such as “recyclable,” “ozone-friendly,” “non-toxic” or “biodegradable.” In the absence of a mechanism for verifying these claims, the only guarantee that the product performs accordingly is the producer’s reputation.

*Second party* labeling is conducted by industry-related entities, such as trade associations, which establish guidelines or criteria for making claims about the product. Once the standards are met or the guidelines followed, an industry-approved label is placed on the product stating or verifying the product’s environmentally friendly qualities. In this instance, corporate members of the certifying organization will seek to ensure the label’s value, and to mandate its use, so that no single producer will have an advantage over any other.

*Third party*, or independent, labeling is performed by either a governmental agency, a non-profit group, a for-profit company, or an organization representing some combination of these three. As with the second party type, third party labeling programs set guidelines that products must meet in order to use their label. They may also conduct audits in order to ensure compliance with the guidelines. As the name implies, third party organizations are not affiliated with the products they label (Caldwell 1998; Bass and Simula 1999).

*Timber certification* comes in two forms. *Forest management certification* involves assessment of forestry practices by a company, community, or other organization according to a set of predetermined standards. The focus of such certification may be an individual forest or a set of forests managed by a single entity. It may also be conducted regionally or nationally, depending on the management structure of the forestry and timber sectors in a given country. *Wood product certification* involves an inspection of the “chain of custody” to follow wood throughout the commodity chain. This is done by auditing individual organizations at each step of the chain to determine whether or not they are using materials from certified sources (Oliver 1996).

Finally, the entity responsible for overseeing certification may be either *independent* (third party) or *national*. In the former case, standards are usually formulated by an organization, whether public, private, or non-profit, with no ties to the companies whose practices and products are subject to certification. The standard-setting organization then authorizes other independent entities to act as certifiers. Alternatively, certification standards may be devised by national forest and timber associations whose members are owners of forests and producers or sellers of wood products. In the latter case, responsibility for certification can be under the authority of the state itself, in the form of either a government agency or an “independent” body established or chosen by the state. In all cases, the company or individual seeking certification for a property pays the independent auditor to examine, assess, and certify the forest. Once approved, certified timber companies, producers, and products are permitted to display an *eco-label* intended to inform consumers that SFM standards have been met (Oliver 1996). Clearly, however, the credibility of a certification is no easy thing for a consumer to assess, and it is retailers that provide the information and assurances for those customers concerned about the origins of the lumber they purchase.

Estimates of the total area of “certified forests” worldwide range from 265 to almost 500 million acres (about 2–5 percent of the world’s forests; FAO 2001: xii; CSFCC 2002). Statistics about availability and sales of certified lumber and wood products do not appear to be available, although several large home-supply and DIY companies have, either under activist pressure or out of self-interest, agreed to carry certified wood. Among the best known of these is Home Depot in the United States.

### ***Public regulation***

Negotiations over an international forest convention, which would establish some level of harmonized SFM standards among countries, failed repeatedly during the 1990s. The Rio Forest Principles contained no provisions for an international law to regulate forestry. At the time, states were leery of being bound to a single set of rules—some, such as Brazil, feared that a convention would become the basis for the internationalization of the Amazon—while many environmental NGOs believed that any agreement would only foster increased global trade in timber and further boost already-high rates of deforestation. How did this state of affairs come about?

The first major international initiatives in this direction were launched during the 1980s, divided between management for protection and management for production. In 1983, timber producing and consuming countries established the International Tropical



Timber Organization (ITTO) and negotiated and signed the first International Tropical Timber Agreement (ITTA), in order:

To promote the expansion and diversification of international trade in tropical timber and the improvement of structural conditions in the tropical timber market; to improve market intelligence with a view to ensuring greater transparency in the international tropical timber market; to encourage members to support and develop industrial tropical timber reforestation and forest management activities; [and] to encourage the development of national policies aimed at sustainable utilization and conservation of tropical forests and their genetic resources, and at maintaining the ecological balance in the regions concerned.

(ITTO 1983; see also ITTO 2004; Schwartzman and Kingston 1997)

In 1985, the World Wide Fund for Nature (WWF) convinced the 35-odd developing country members of the ITTO to pledge that, by 2000, they would trade only in forest products originating from sustainably managed forests. Country-level guidelines on sustainable forest management were developed soon thereafter, but were rarely put into practice. In 1989, an influential ITTO study (Poore *et al.* 1989) concluded that less than one-eighth of 1 percent of all tropical forests (less than 1 million hectares) were under sustainable management regimes, but the intergovernmental body and its member governments failed to act on this finding. The following year, the ITTO rejected a WWF proposal to initiate an independent scheme that would assess and certify sustainable forestry so as to help realize the Year 2000 pledge, and WWF decided to start its own program. The result was the Forest Stewardship Council (FSC; see p. 120). In 1991, the ITTO finally adopted guidelines for sustainable forestry management, but these were neither binding on countries nor monitored for adherence to the standards. In 1994, a new ITTA was formulated but this, too, seems to have proven fairly ineffectual. Since then, the ITTO has focused mostly on green labeling, although this has been opposed by the United States which sees such labeling as a barrier to trade (Schwartzman and Kingston 1997:41).

The ITTO was not the only game in town. In response to growing industrialized country concern about tropical deforestation during the 1980s, the World Resources Institute, the World Bank, the UN Development Program, and the Food and Agriculture Organization launched the Tropical Forestry Action Plan (TFAP) in 1985. The TFAP was meant to advise developing country governments on sustainable forestry while also coordinating development aid in support of plans and practices. But initial enthusiasm for the TFAP began to fade after several years, and NGOs accused it of fostering, rather than slowing or preventing, deforestation. By 1990 the TFAP had been judged a failure, unable to coordinate conservation and development. Indeed, a report published in 2000 concluded that, although annual net tropical deforestation had declined, this was “mainly due to significant increases in forest plantations and the succession of forests on abandoned agricultural lands” (FAO 2000:8).

By 1990, too, the first international efforts to formulate a forestry convention had begun. During that year alone, as many as nine proposals were issued for a “Global Forest Agreement,” covering tropical as well as boreal and temperate forests (Fogel

2002:119). Developing countries (DCs) were strongly opposed to any kind of global regulation, viewing it as an attempt by industrialized countries (ICs) to gain control of tropical forests. The DCs demanded compensation if they were to be denied the sovereign right to exploit their national forests, while the ICs refused to discuss anything of the sort in the absence of concrete commitments by the DCs. As a result, the UNCED Forest Principles bound no one to do anything (Fogel 2002:121–2). By the early 1990s, moreover, many NGOs that had once supported a forest convention had turned against the idea, convinced that it would only encourage trade in timber and only serve to accelerate deforestation.

Given the momentum generated by the UNCED Forest Principles, however, in 1993 two interested states proposed establishment of an Intergovernmental Working Group on Global Forests (IWGF; the word “global” was later dropped). A joint initiative of the Canadian and Malaysian governments, the IWGF held a series of meetings of experts and officials from 15 key forest countries as well as several NGOs to facilitate dialogue and consolidation of approaches to the management, conservation, and sustainable development of the world’s forests. By the second meeting, attendance had expanded to include technical and policy experts from 32 countries including Brazil, the US, Indonesia, Finland, Sweden, the Russian Federation, Japan, Gabon, five intergovernmental organizations, and 11 NGOs (IISD 2003).

At the end of 1994, the final report of the IWGF was presented to the UN Commission on Sustainable Development (CSD) which, at its third meeting in 1995, proposed to establish an *ad hoc* Intergovernmental Panel on Forests (IPF) to further examine issues and develop proposals and recommendations. The IPF held four meetings through 1997, when its final report was submitted to the CSD (IISD 2003). As a follow-up to the work of the IPF, the UN Economic and Social Council (ECOSOC) established the Intergovernmental Forum on Forests (IFF), which pursued the work of the IPF and developed additional action proposals. Ultimately, the IPF and IFF together issued 270 proposals for action (UNFF 2004). Finally, in 2000, ECOSOC established a permanent entity, the UN Forum on Forests (UNFF), to build on the work of its predecessors (UNFF 2004).

None of these initiatives led, however, to a global forestry convention, and therein lies a tale. Initially, the United States was a strong supporter of an agreement, in the view that *tropical deforestation* represented a major contributor to global warming. Preferring to see industrialized countries reduce their emissions, the UNCED Forest Principles were the most to which the developing countries would agree. After UNCED, a number of governments, including European ones, DCs, and Canada, supported a global agreement but this led nowhere. By 1996, moreover, the US position had changed completely, as boreal and temperate forests came to be included in the remit of the various panels and forums addressing deforestation. This generated growing industry opposition to an agreement. Environmental organizations, too, were opposed to an international convention and wished, instead, to see forest conservation addressed through the Convention on Biological Diversity (Fogel 2002:129).

The final nail in the coffin of a forest convention might have been hammered in when the Kyoto Protocol became the locus of global forestry regulation, under the rubric of “LULUCF” (Land Use, Land Use Change, and Forestry). In effect, the United States and several other countries began to see in forests the possibility of sequestering carbon and

avoiding the need to actively reduce greenhouse gas emissions in other sectors, such as transport and industry. Cathleen Fogel (2002) has nicely documented the logic behind this shift from conservation of standing forests to sequestration through replanting forests already cut down. Through the Clean Development Mechanism and other modalities, carbon emissions in the form of standing trees will be traded, and sustainable forestry will become something quite different from what was originally envisioned. While a few countries, such as Canada, continue to call for a global convention in order to override the growing proliferation of forestry certification schemes, for the moment global public forestry regulation appears dead.

### *Activist regulation*

By contrast, private forestry regulation is booming. The first activist programs opened for business in 1989. In response to the 1988 ITTO study cited earlier (Poore *et al.* 1989), the Rainforest Action Network (RAN), based in San Francisco, initiated successful US consumer campaigns to boycott the import and use of all tropical timber except that produced from sustainably managed forests. In 1989, RAN launched “Smart Wood,” the first industry-independent certification program. At the same time, the Rogue Institute in Ashland, Oregon began a verification program to promote environmentally sensitive timber production as an alternative to clearcut logging in the southern part of the state. Other groups focusing on sustainable forestry included the Sierra Club, Friends of the Earth, Greenpeace, the National Wildlife Federation, and the Woodworkers Alliance for Rainforest Protection (WARP), the last representing concerned wood users, as well as several smaller grassroots forests groups, indigenous peoples, social organizations, timber producers, and timber retailers from several countries. Today, although there are no reliable statistics, the number of nongovernmental organizations and industry-linked groups dealing with forest certification must number in the high hundreds or low thousands, based in virtually every country with significant timber or retail lumber sales (recent overviews of private regulation and certification include Teeter *et al.* 2003; Meidinger *et al.* 2003a; and C ashore *et al.* 2004).

The **Forest Stewardship Council (FSC)** is the best-known of the private non-profit certification groups. The FSC was launched in 1993 in Washington, DC by environmental groups, the timber industry, foresters, indigenous peoples, and community groups from 25 countries, with initial funding provided primarily by the Worldwide Fund for Nature/World Wildlife Fund (WWF). An interim board was elected, a mission statement adopted, and draft Principles and Criteria for Forest Management formulated soon thereafter. The FSC was originally based in Oaxaca, Mexico but subsequently moved its central office to Bonn, Germany so as to be better positioned to compete with other standard-setting organizations. The FSC is a membership organization and comprises three equally weighted chambers—environmental, social, and economic—and membership within each chamber is also equally weighted between North and South. As the FSC’s web site puts it (FSC 2002):

- The Environmental Chamber includes non-profit, nongovernmental organizations, as well as research, academic, technical institutions and individuals that have an active interest in environmentally viable forest stewardship;

- The Social Chamber includes non profit, nongovernmental organizations, as well as research, academic, technical institutions and individuals that have a demonstrated commitment to socially beneficial forestry.
- The Economic Chamber includes organizations and individuals with a commercial interest. Examples are employees, certification bodies, industry and trade associations (whether profit or non-profit), wholesalers, retailers, traders, consumer associations, and consulting companies.

Each chamber represents 33 percent of the vote at Annual Meetings, and the Board of Directors has rotating members reflecting these interests. By 2001, the FSC had become an internationally recognized organization with 488 members from 56 countries, with 229 in the economic chamber, 86 in the social chamber, and 174 in the environmental chamber (Meridian Institute 2001:20).

With international governmental processes in apparent stalemate, the FSC has come to be seen by many as a “magic bullet,” a market-driven mechanism able to fill a critical niche towards achieving sustainable forest management where governments cannot. Certainly, its mission statement (FSG 2002) encourages this view:

- 1 The Forest Stewardship Council A.C. (FSC) shall promote environmentally appropriate, socially beneficial, and economically viable management of the world’s forests.
- 2 Environmentally appropriate forest management ensures that the harvest of timber and non-timber products maintains the forest’s biodiversity, productivity, and ecological processes.
- 3 Socially beneficial forest management helps both local people and society at large to long-term benefits and also provides strong incentives to local people to sustain the forest resources and adhere to long-term management plans.
- 4 Economically viable forest management means that forest operations are structured and managed so as to be sufficiently profitable, without generating financial profit at the expense of the forest resource, the ecosystem, or affected communities. The tension between the need to generate adequate financial returns and the principles of responsible forest operations can be reduced through efforts to market forest products for their best value.

The FSC has developed and adopted global Principles and Criteria for Forest Management and it accredits certifying organizations that agree to abide by these Principles and Criteria. Purportedly, the FSC also monitors the operations and portfolios of such certifying groups on an annual basis. In cooperation with lumber retailers, the FSC creates Buyers Groups in consuming countries. Members of these groups are committed to selling only verified “sustainably produced” timber in their stores (FSC 2002). As of June 2004, the FSC had granted 623 “forest management certificates” in 62 countries, covering some 95 million acres (Edwards 2004), and 3,136 “chain of custody” certificates in 66 countries (Certified Forests 2004).

The actual ecological and social results triggered by the FSC system are not entirely clear, however, although several studies of these matters have been conducted (Freris and Laschefski 2001; Meridian Institute 2001; Counsell and Loraas 2002). There are indications that, in some locations, FSC regulation does not lead to ecological or social outcomes that exceed those already required by existing governmental policies. In other

instances, its standards may not actually be implemented by producers, due to the FSC's relatively weak institutional base. Funding and personnel to monitor implementation are scarce and penalties for failing to observe the rules are few (e.g. Freris and Laschefski 2001). Moreover, the large financial stakes involved have led forest products companies to become actively involved in standard-setting and implementation activities in several countries such as Sweden and British Columbia, Canada. This appears to be leading to a "consensus" rather than "science-based" approach to standardsetting in order to make the standards achievable, and thus to ensure that the large and growing market demand will indeed be met.

An additional challenge to the FSC's success may be the broader trend toward green labeling that it has inspired. Its forest product certification program has triggered numerous corporate and government responses, and considerable alarm. A growing number of organizations, including the American Forest Products Association, and the Canadian Pulp and Paper Association, in conjunction with the International Organisation for Standardisation, have developed certification programs (e.g. SFI n.d.; CPPA 2002; Wood 2000; see also Meidinger *et al* 2003b). While these industrial projects might have originally reflected an attempt to expropriate forest product certification processes, principles and discourse from the FSC and other environmental organizations (Hauselmann 1997), more recently there appears to be a growing interest in reconciling national programs with each other and with those of the Forest Stewardship Council (CPPA 2002).

### *Private regulation*

The **International Organization for Standardization (ISO)**, based in Geneva, is a quasi-governmental body with member organizations in 119 countries. It is the official standard-setting and labeling body recognized by the World Trade Organization and other international agencies (see e.g. Cascio *et al.* 1996; Clapp 2005). Founded in 1946,

ISO's mission is to promote standardisation and related activities in the world with a view to facilitating the international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity by developing worldwide technical agree-ments which are published as international standards.

(Hauselmann 1997:3)

With an annual operating budget in excess of \$125 million, provided by governments and corporate members, the ISO is far larger than the FSC and other comparable certifying organizations. Around the world, it hosts as many as ten standards-setting meetings each day (Hauselmann 1997:3). The organization only provides the context within which standards can be negotiated and promulgated; it does not engage in policing corporate behavior, enforcing standards, or penalizing violators. In fact, individual corporations generally devise their own internal performance programs which are vetted and certified by an authorized company or organization. In other words, a producer whose program receives second party certification from an ISO-approved auditor is, for the most part, self-regulating and responsible for seeing that it meets the terms of its programs.

Historically, the ISO has neither worked on nor developed competency in either environmental or forestry issues. Until the early 1980s, it limited itself to purely technical standards, such as the size of nuts and bolts (Hauselmann 1997). The demand for environmental standards grew out of a concern that these might be imposed “from above” as a result of interstate agreements and conventions. Growing public agitation over the absence of any environmental considerations in the GATT and, later, the WTO also contributed to the ISO’s entry into the environmental standards business (Lally 1998:4). In 1993, the ISO initiated a process of developing a new “ISO 14000 Series” of Environmental Management Systems standards. This was intended to build on the success of the ISO 9000 Quality Management Systems, which are de facto requirements for companies engaging in most sectors of international trade (Cascio *et al.* 1996). Those standards are driven by the market and based entirely on self-regulation (Lally 1998:3).

The ISO’s Environmental Management Systems (EMS) approach differs from the FSC’s Principles, Criteria and Standards for forest management in that EMS prescribe only *internal* management systems for companies that wish to continuously improve upon an environmental performance level which they themselves define. Adherence to externally agreed standards (ostensibly set by all interested stakeholders) is not required (as it is in the FSC). Furthermore, the ISO has no adequate mechanism either to ensure corporations’ compliance with or the effectiveness of their individual action plans, or to control the use (or misuse) of logos and certification marks. In other words, ISO-14000 involves only *first party* certification.

As a result, there is, according to one observer (Hauselmann 1997), a

potential for confusion...this situation is worse in the case of forest management certification, where some economic interests are seeking to use the ISO framework to develop a forestry-specific application of the Environmental Management System (EMS) approach in order to counter an existing and operational environmental labeling scheme—that of the Forest Stewardship Council.

Although the ISO has well-developed procedures on consensus and participation, these have not been well followed in creating ISO-14000. Environmental organizations have not been allowed to attend standards-setting meetings (Hauselmann 1997), ostensibly to avoid “politics.” Instead, corporate forest product industry efforts seem to be aimed at imbuing the ISO with an aura of scientific, technical and *social* legitimacy, all the while maintaining a near-perfect level of control.

Nevertheless, forest industry members and supporters of the ISO 14000 Series are using the discourse developed by the FSG and environmental groups to describe their systems approach in terms uncannily similar to those adopted by the FSC. For example, a 1997 press release issued by the Canadian Sustainable Forestry Certification Coalition (an industry group), promoting ISO forest certification, claimed that

we have identified the background information that forestry organizations will find useful as they implement and progressively improve upon their Environmental Management System. This major step forward in relating the key elements of the ISO standard in the context of a range of

international forest management measures will further the UN Agenda 21 goal of promoting sustainable development.

(CSFCC 1997)

Some ISO members continue as well to actively push forward the development of international ISO forest management system standards. Others are concerned that certification might obstruct free trade and are active at the WTO Environment Committee to limit the definition and mutual recognition of eco-labels by GATT country signatories. Consequently, although timber products may carry ISO certification, what might lie behind the label remains none too clear.

### ***Transnational regulation: mutual recognition of national standards***

The large number of forestry certification programs has been particularly frustrating to national timber industry associations, who see fragmented and privatized regulation as disadvantageous to their members. As a result, something of a backlash has developed among the national associations who would prefer to retain their own national certification systems but have them recognized by other national associations. Because the likelihood of formulating a global forest convention, much less ratifying one, is so low, the industry strategy has been to seek “mutual recognition” of competing standards. As the “Canadian Sustainable Forestry Certification Coalition,” composed of national, provincial, and sectoral associations, has put the case (CSFCC 2002) for mutual recognition:

Although nice in concept, it is unlikely that one standard could ever speak to the diversity of forest types and ecosystems across North America, to the diversity of tenure systems, to public ownership, to private ownership, to the different needs and operating systems within a business, including their varied sources of wood supply, or to the different needs and priorities of the users of wood products. While one standard could run the risk of not speaking to the forest management realities of many operations, many standards will likely result in more widespread application, and in the end, more improvements in forest management.

One transnational harmonization scheme is the **International Forest Industry Roundtable’s** (IFIR) mutual recognition project. IFIR is a self-described “independent network of industry associations,” with members from Argentina, Australia, Brazil, Canada, Chile, Finland, France, Malaysia, Mexico, Norway, New Zealand, South Africa, Sweden, the United Kingdom, and the United States. In 1999, IFIR established a working group to develop an “International Mutual Recognition Framework” for national forestry certification standards, intended to

provide a critical mass of credibly certified wood products by recognising that *different* certification systems can provide *substantively equivalent* standards of sustainable forest management. Mutual recognition would set a high threshold for entry for participating standards, while enabling the

use of standards that accommodate local and regional circumstances. By providing a process to *differentiate credible from non-credible* certification standards, mutual recognition would use market forces to provide a range of certification standards that will assure customers that their wood product purchases contribute to sustainable forest management.

(Griffiths 2001:3; emphasis in original)

Although it is not stated outright, mutual recognition of national standards may also be directed against the Forest Stewardship Council, which is beginning to look like a default global standard setter, if only because of its broad membership and environmentalist credentials (Griffiths 2001:8). There is also fear of the “potential *imposition* of ‘mandatory’ solutions via government regulation at the national or international level” (Griffiths 2001:8) if the industry is unable to self-regulate.

As of this writing, the IFIR appears to be moribund, having been largely replaced or co-opted by the **Programme for the Endorsement of Forest Certification** (PEFC). The PEFC Council was initiated in 1998 by European national forest associations and landholders who believed they were already engaged in sustainable forest management but felt unfairly attacked by various environmental organizations. They were also concerned that FSC standards might be broadly adopted throughout the continent (Meidinger *et al.* 2003b: 18). In mid-1999, representatives of 11 “officially constituted national PEFC governing bodies with the support of associations representing some 15 million woodland owners in Europe and of many international forest industry and trade organizations” met in Paris to launch the organization (PEFC 2004a).

According to its web site (PEFC 2004b):

PEFC is a global umbrella organisation for the assessment of and mutual recognition of national forest certification schemes developed in a multi-stakeholder process. These national schemes build upon the inter-governmental [*sic*] processes for the promotion of sustainable forest management, a series of ongoing mechanisms supported by 149 governments in the world covering 85% of the world’s forest area.

In effect, the PEFC has become the international forum for mutual recognition of national forest standards. It issues both forest management and chain of custody certificates, carried out by independent certifiers that meet ISO certification requirements and are accredited by independent national accreditation bodies that also follow ISO rules. Certification and accreditation standards are, in effect, certified by other international or regional bodies so as to assure the equivalence of certifications issued in different countries (PEFC 2004c). As of 2004, 27 countries with “independent national forest schemes” are PEFC members. Most are European, but Brazil, Canada, the United States, Australia, Chile, and Malaysia are also members. Of these, 13 schemes covering 110 million acres “have been through a rigorous assessment process involving public consultation and the use of independent consultants to provide the assessments on which mutual recognition decisions are taken by the membership” (PEFC 2004b). Finally, according to the PEFC,



it offers a system that is superior to the FSC because it facilitates active involvement of all forests and enterprises regardless of size. This includes family-owned forests and also small to medium sized forest enterprises as well as multinational corporations; and accomodates [*sic*] and incorporates the global diversity of forest types, cultural heritage, ownership structures and management objectives.

(PEFC 2004d)

The FSC standards are meant to be global, the PEFC's, national. The credibility of the PEFC's program rests on the belief that it generates results as good as the FSC's and will be preferred by consumers loyal to the nation and national standards. At the same time, however, what is presented as an advantage (national "diversity") might also provide an opportunity for undue industrial and landowner influence and undermine the program's credibility. Who, then, can you believe?

### **Does private regulation work? Can it?**

Ultimately, the question comes down to this: Does private certification of sustainable forestry provide an adequate substitute for public regulation? For the most part, the jury remains out on this question. Recognizing that public regulation has hardly been without serious flaws and that the state has, in fact, been a major contributor to forest destruction throughout the past several centuries, might not private schemes offer greater protection than public ones? The stakes are large. According to IFIR, global sales in the forest products business amount to about \$500 billion per year, of which some 30 percent enters international trade (Griffiths 2001:5). The market for certified timber is, as yet, only a small fraction of this, but there is a widespread conviction that it can only grow much larger.

In the case of sustainable forest management (SFM), the "spillover" criteria discussed in Chapter 4 are not precisely transferable. The "ratcheting" argument of Fung *et al.* (2001)—that producers will raise their standards in order to remain competitive—appears more germane. This is especially the case if landowners and timber companies belong to national associations and have an interest in leveling the playing field. At the same time, however, the SFM criteria established by such associations may serve to fulfill only a portion of the requirements set by an organization such as the Forest Stewardship Council.

More to the point, different standards may emphasize different criteria. For example, the FSC lists as one of its major concerns benefits to "local people" (FSC 2002). While this might be thought to refer to small-scale landowners (as in the case of the PEFC), it is, in fact, a reference to indigenous forest peoples. The FSC's First Chamber includes indigenous organizations, while Principles 2 and 3 of the organization's ten principles state that "Long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established; [and] the legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected" (FSC 2003:37).

By contrast, the PEFC (2004d) speaks of “stakeholders,” “diversity,” and “cultural heritage,” but mentions only “family-owned forests” and says nothing about indigenous peoples. Of course, it is the responsibility of the individual national associations to decide what criteria to include—are there any indigenous peoples in Germany?—but these may tend more toward the interests of capital than society. As a study produced by FERN, the Forests and the European Union Resource Network (Ozinga 2004:30), points out,

a consumer label is required to inform the consumer about what certification means. Consumers care about old growth forests, pesticide use, clear cutting, land rights of Indigenous Peoples and other issues. All certification schemes, therefore, ought to be based on clear minimum performance-based standards that allow consumers to make an informed choice...none of the schemes [assessed here]—again with the exception of the FSC—has meaningful performance-based standards that provide this guarantee. All certification schemes with the exception of FSC allow for the conversion of forests to plantations—by bending the definition of “forest” to include “plantation” these schemes are making a mockery of “good forest management.”

Clearly, the most important question is how environmentally effective are these regulatory schemes? Most of the available research focuses on the content of the principles and standards offered by the schemes, the conditions under which forest owners participate in certification schemes, or the performance of the certification process (see e.g. Meridian Institute 2001; Ozinga 2001, 2004). The vast majority of certified forests are in industrialized countries, and it appears that most of those forests are already being managed close to certifier standards. Furthermore, the long-term consequences of certification, especially for natural forests (whether old growth or new growth) cannot be assessed until a significant fraction of a harvesting cycle has passed. Consequently, for the time being there appears to be no way to determine whether certification, as a policy instrument, offers a viable long-term means of protecting the environment (Bass *et al.* 2001).

Furthermore, there are significant costs to meeting certification standards for SFM. The growing demand for certified lumber and wood products has outstripped supply, and this has made it possible to sell certified goods at a premium. As certification becomes more widespread, however, this premium will decline and, at the margin, will provide little or no benefit to the producers in the timber commodity chain. At that point, all else being equal, the benefits of sustainable forestry will have been internalized and socialized, with the global public and environment as the beneficiaries. But, if sustainable forestry is voluntary and coverage does not extend to all forests, whether North or South, there will be strong incentives by non-certified producers to free-ride on the global trade system. Recall, moreover, that nothing but consumer choice can prevent this outcome inasmuch as the WTO forbids discrimination against substantially equivalent products on the basis of production method (see e.g. FERN 2003).

Finally, while certification does reduce transaction costs for the consumer of lumber and wood products, those “savings” might be wiped out by the premium that can be charged for certified lumber. The global benefits of sustainable forestry will be

imperceptible to the individual consumer while the concentrated costs of more expensive lumber will be quite evident. A study of ecolabeled forest products conducted by Oregon State University researchers (Anderson and Hansen 2002:1) at two Home Depot Stores concluded that:

- The ecolabeled product outsold the non-ecolabeled product 2 to 1, so long as the price of plywood in each bin was equal.
- When the ecolabeled plywood was priced at a 2 percent premium, the non-ecolabeled product outsold the ecolabeled by 1.7 to 1.
- 37 percent of the sales were to consumers who paid a 2 percent price premium.

These findings suggest that, by the time the price premium rises as high as 10 percent, consumers may think twice about buying certified goods. Moreover, it is one thing to tack a 10 percent green surcharge on a two-by-four costing three dollars or a piece of furniture that may cost a few hundred dollars; it is quite another to charge an extra 10 percent on a \$20,000 remodeling job or a \$300,000 house, which may make the difference between obtaining a mortgage and having a loan application turned down.

Might there be other benefits from certification, such as innovative methods of forest management? If there are any innovations driving the movement for sustainable forestry, they are *social*. To be more precise, the demand for certification is driven by two motivations (and a long feedback loop): habitat maintenance, on the one hand, and consumer consciousness, on the other. Protection of forests and habitat could be accomplished by any number of “command and control” strategies, many of which have been tried and many of which have failed. Because the market is such a powerful force in environmental degradation, and efforts to exclude the market from environmentally sensitive areas have often failed, the temptation to “harness the market” in the service of environmental protection seems both innovative and promising. The consumer appears to be the lever that can move industry toward sustainable forestry management. By appealing to the interests of both—the consumer’s in environmental protection and the corporation’s in increased profits—certification looks like a magic formula. But isn’t most magic simply sleight of hand?

## Conclusion

As suggested by this chapter, private regulation of forestry practices is based on markets and market-based strategies as mechanisms to foster compliance. As progress in the formulation of conventions and protocols has slowed, especially in the environmental issue area, the demand for such private regulation has grown. The area of certified forests and the volume of certified wood products has certainly grown over the past decade, from virtually nothing to a few percent of stock and production. Both social activists and the timber industry have an interest in the institutionalization of such certification, although for quite different reasons. Activists wish to see forests conserved, if not preserved; industry wants to ensure that restrictions on the cut remain as limited as possible. Reconciliation seems improbable (Magnusson and Shaw 2003).

At the same time, however, corporations engaged in the production of material goods have no inherent interest in environmental protection, with two exceptions. First, a failure

to reduce externalities may increase variable costs from fines and lost business, which requires the kind of policing that ISO-14000 does not address and that many corporations are loath to accept. Second, having a “green” reputation could increase corporate profits. A producer who voluntarily controls externalities, and engages in virtuous behavior, can advertise such practices and, with luck, grab a little extra market share. It might even be possible to charge a premium for green certification, for which high-income consumers will gladly pay. So, there is available here both a moral and a market opportunity. Corporations can do well by doing good, while certifiers can do good by doing well. And, as we shall see in the following chapter, doing well by doing good is nowadays all the rage.

**Note**

1 More to the point, unless there is some binding agreement on the distribution of such permits, national governments will be hard put to prevent the kinds of corruption and black marketeering that have appeared in connection with other environmental protocols, such as Montreal.

## 6

# Corporate social responsibility as business strategy

*James K. Rowe*

Four hundred years earlier, social responsibility shifted from the church to the state, as government replaced religious institutions as society's predominant force. At the dawning of the twenty-first century, business appears the next likely candidate to carry this mantle.

Joel Makower and Business for Social Responsibility  
(1994:33)

### Introduction

Speaking to the World Economic Forum meeting in Davos, Switzerland, on 31 January 1999, UN Secretary-General Kofi Annan warned corporate executives and financiers gathered there that global capitalism was under fire. In order to slow the advance of globalization's critics, Annan suggested a global initiative that would institutionalize good "corporate citizenship." As he put it then, "Let us choose to unite the power of markets with the authority of universal ideals" (Annan 1999).

Eighteen months later, amidst great fanfare, a "high-level" meeting was held in New York to review and finalize what was called the "Global Compact." The meeting was attended by representatives from almost 50 companies, including Daimler Chrysler, Unilever, Deutsche Bank, BP Amoco, Novartis, Ericsson, and Nike, as well as International Confederation of Free Trade Unions, Amnesty International, the World Wildlife Fund, the World Conservation Union IUCN, and a consortium of developing country nongovernmental organizations. In opening the meeting, Annan proclaimed that "open markets offer the only realistic hope of pulling billions of people in developing countries out of abject poverty, while sustaining prosperity in the industrialized world." The Compact was essential, therefore, "to ensure that the global market is embedded in broadly shared values and practices that reflect global social needs, and that all the world's people share the benefits of globalization" (Annan 2000:1–2).

But what is the Global Compact? According to publicity materials released in conjunction with the meeting (UN 2000),

The Global Compact is a UN-sponsored platform for encouraging and promoting good corporate practices and learning experiences in the areas of human rights, labour and the environment. It is an entry point for the business community to work in partnership with UN organizations in

support of the principles and broader goals of the United Nations, and provides a basis for structured dialogue between the UN, business, labour and civil society on improving corporate practices in the social arena.

The Global Compact, in other words, is a substitute for public regulation, an attempt to sidestep the diplomatic difficulties of dealing with the nasty bits of internationalized capitalism, what have been called “externalities” in earlier chapters of this book. The Compact also represents an attempt to globalize the growing “corporate social responsibility” (CSR<sup>1</sup>) movement.

What is CSR? It is defined by Business for Social Responsibility, a global non-profit funded by corporations, as “achieving commercial success in ways that honor ethical values and respect people, communities, and the natural environment” (BSR 2003). According to Jeremy Moon (2002:385–6), Professor of Corporate Social Responsibility at Nottingham University,

Business social responsibility...refers to the voluntary contribution of finance, goods or services to community or governmental causes. It excludes activities directly related to firms' production and commerce. It also excludes activity required under legislation or government direction.

The common thread that weaves through the various definitions of “Corporate Social Responsibility” is the *voluntary* nature of the good practices referenced. What makes CSR initiatives “socially responsible” is that they are *not* mandated by governmental or intergovernmental institutions—they are voluntarily pursued. The most celebrated mechanism in the CSR toolkit, as evident from earlier chapters, is the “corporate code of conduct.” The Organization for Economic Cooperation and Development (OECD) defines corporate codes as “commitments voluntarily made by companies, associations, or other entities, which put forth standards and principles for the conduct of business activities in the market-place” (1998:5). But how effective can voluntary and largely unverified corporate efforts to minimize market externalities be?

More and more studies measuring the (in)effectiveness of voluntary corporate codes are being published every day. The results are mixed. Some find promise (Schrage 2004; Kolk *et al.* 1999) whereas others are much more critical (Christian Aid 2004; Zarsky 2002; OECD 2003). The consensus underlying these divergent findings is that, even if voluntary codes have potential, they are not currently addressing globalization's externalities in a sustained way. But if voluntary codes have not proven effective, or if there is at least no consensus on their effectiveness, why then are corporations, intergovernmental organizations like the UN, and even civil society so interested in them? That is the central question guiding this chapter.

We begin with the less obvious: unpacking civil society's investment in voluntary codes of conduct. For labor and social activists, corporate codes of conduct, even if voluntary, can strengthen efforts to hold corporations accountable. Simply put, condemning an organization for unethical behavior is easier when the said organization has already and openly agreed that ethical behavior is virtuous. Bama Athreya of the International Labor Rights Fund concretizes this point in relation to her organization's campaign against Nike: “Let's face it, hypocrites are far more interesting than mere

wrongdoers, and it's been much easier to sensitize press and public to Nike's failure to implement its own code of conduct than to its failure to comply with Indonesian labor laws" (quoted in Klein 2000:432).

Most labor and social activists supportive of corporate codes of conduct are also mindful of their limits. For one thing, activists lack the resources to monitor the plethora of transnational corporate activities spanning the globe. Thus, a strategic hope for activists is that voluntary corporate codes of conduct developed by individual companies, and international organizations like the UN and OECD, will nurture more regulation-friendly environments both nationally and internationally (Smith 2003). There are thus long-term (gateway to binding social regulation) and short-term (immediate improvements in corporate conduct) rationales for supporting voluntary codes of conduct.

Our aim in this chapter, however, is to question whether the short-term gains provided by CSR and corporate codes are worth the costs. Our argument is that the primary cost of supporting voluntary codes is precisely what global civil society hopes to gain through them: the binding regulation of transnational corporations. We argue that the primary reason for business's trenchant interest in corporate codes is that they are an effective means of quelling popular discontent with corporate power and the political change that discontent might impel. Our research has convinced us to approach corporate codes of conduct less as exemplars of business ethics and more as effective business strategy. By "business strategy," we mean organized responses, through organizations like the International Chamber of Commerce (ICC) and World Business Council for Sustainable Development (WBCSD), to the threat that public regulation (both domestic and international) poses to business's collective self-interest. Thus in simple terms, by unpacking why business is so invested in corporate codes of conduct, we intend to show why corporate self-regulation is a dubious proposition. We support this aim with an historical analysis.

Attention to CSR's historical development reveals that it has flourished as discourse and practice at times when corporations and the institutional structures that supported them became subject to intense public scrutiny. In this chapter, we focus on two recent periods of crisis for the business world, times when the threat of public regulation loomed large:

- 1960–76: when developing countries along with Western unions and social activists were calling for a "new international economic order" that would more tightly regulate the activity of transnational corporations; and
- 1998 and after: when mass anti-globalization demonstrations and high-profile corporate scandals (Enron and WorldCom) have been increasing demand for social regulation.

By accounting for the role of codes of conduct in business's bid to avoid regulation at a time when global opposition to corporate power was even stronger than today (1960–76), we argue that the recent flourishing of CSR should be approached with caution. In other words, the strategic hope that voluntary mechanisms can create regulation-friendly environments is problematic when, historically, corporate codes have been self-consciously invoked by business to avoid social regulation.

Before recounting the past 40 years of struggle over the regulation of transnational corporate capital, we offer a brief account of the modern corporation's emergence in the US at the end of the nineteenth century. This account serves as reminder that corporations

have had legitimacy problems from their very beginnings. They have *always* had to think strategically about appeasing a concerned populace. While using CSR efforts as a strategic resource only became *de rigueur* in the 1960s and 1970s, and almost universal since the 1990s, it is helpful to realize that the corporate world's recent turn to ethics has many historical precedents. These suggest that business's "investments" in ethical practice have never been profound for, otherwise, legitimacy crises would not keep recurring!

### Historical origins

In 1886, the corporation became an individual, with the same limited expectations as every other member of society. Its service to the community was no longer mandated. As Valerie Hans (2000:80) puts it:

Virtually none of the corporations in colonial times were businesses. More often, governments granted corporate charters to cities, churches, and charities; the charters specifically designated their powers, privileges, and obligations. After the American Revolution, localities awarded corporate charters for the undertaking of collective projects that would benefit the community.... Because these early corporate charters still specified the particular purposes and duties to be fulfilled by the corporation, and often limited the length and terms of the corporate enterprise, the state exerted significant control over corporate activity, at least in theory.

Prior to the landmark *Santa Clara County v. Southern Pacific Railroad* (1886) case that bestowed legal personhood upon the modern corporation, they were fewer, smaller, but most importantly different in purpose. Instead of being "natural" and autonomous profit-maximizing entities, corporations were direct products of, and beholden to, the state. This was all changed by the US Supreme Court: "American law asserts...the constitutional equality of persons and corporations. This leads to the inference contained in the judicial instruction that corporations should be treated similarly to individual persons, judged by the same standards, and evaluated within the same framework" (Hans 2000:83). The modern corporation's "emancipation" freed it from state control, thus enabling it to engage in its primary pursuit of private profit. While profits were made by providing necessary goods and services, and the corporation had to be mindful of social responsibilities, these were no longer chartered; they were voluntary.

The formal equality of individual and corporation quickly stopped resonating with most Americans, and led to the beginnings of what we might recognize as modern CSR discourse. Corporate mergers and the emergence of the great trusts at the turn of the late nineteenth century, such as Standard Oil, made a mockery of formal personhood. The corporation came to appear superhuman, more Goliath than David. According to Roland Marchaud (1998:2),

The pure size of many corporations—their number of employees, the magnitude of their production, their capital resources, their national scope



in distribution, and their capacity for political influence—persuaded many Americans...that the nexus of social institutions within which they lived had been radically transformed. The traditional potency of the family, the church, and the local community suddenly seemed dwarfed by the sway of the giant corporations. This momentous shift in the balance of social forces created a crisis of legitimacy for the large corporations.

And, he continues (1988:7),

If the Court had assumed almost god-like powers in conferring “personhood” on the inanimate business corporation, still its juristic finger—unlike that of God in Michelangelo’s Sistine ceiling—did not have the authority to bring this commercial entity to life as a moral “person.” The big business corporation, as a rising chorus of American voices chanted insistently from the 1890s onward, had no soul.

As Marchaud makes clear, the modern corporation’s legitimacy crisis was rooted in the sheer growth in size and influence that necessarily distanced the corporation from those whose lives it so profoundly and often carelessly affected. The corporation became both too present *and* absent in ordinary Americans’ lives. “He” was power without personality, without proximity; “he” was cold and distant.

The solution to this perceived inhumanity was what we now recognize as marketing and public relations. An important part of the “personality” campaign the “person” campaign had already been won—launched at the turn of the century involved cultivating an air of benevolence and responsibility—*noblesse oblige*. Thus, for instance, did Andrew Carnegie fund the construction and filling of libraries all over the country.

The corporation was larger and more powerful than the individual Americans he affected, but now, at least in word, he cared. “In our more secular, less naïve contemporary world,” writes Marchaud (1998:4), “we see such attempts to augment moral legitimacy as campaigns to gain corporate prestige or a reputation for social responsibility. But in the late nineteenth and early twentieth centuries, both advocates and critics of the giant corporation spoke of similar aspirations as quests for a corporate soul” (see also Nace 2003).

While corporations found themselves under scrutiny again during the Great Depression, it was not until the 1960s that the corporate world was forced into reputation management efforts commensurable with the late nineteenth century. To communicate the depth of this global crisis, our historical account begins in the United States, where even the putative beneficiaries of American hegemony and corporate power—the American people—were becoming increasingly concerned about corporate power at home and abroad.

### **World order contended (1960–76)**

The United States emerged as the world’s dominant economic actor in the aftermath of World War II. The federal government’s encouragement of corporate participation in

European economic recovery abetted the outflow of foreign direct investment and, in the post-war era, the transnational corporation (TNC) became a symbol of American economic power (Gilpin 1975:139; Servan-Schreiber 1968). But while the national economic growth impelled by the internationalization of US capital materially benefited Americans in general, by the mid-1960s the costs of an increasingly global economy (even if dominated by American corporations) were being felt at home. Mounting balance-of-payments problems, rising inflation, and growing unemployment through the 1960s and early 1970s led, eventually, to a systemic crisis. The last, in particular, was attributed by organized labor to escalating import penetration by European and Japanese companies as well as “capital flight” involving the closure of American plants and factories and the outsourcing of jobs to the developing world. US labor was not alone in its concerns. Movements for consumer safety, environmental protection, and social justice were also flourishing, driven by concerns about the power, flexibility, and unaccountability of corporations operating at home and abroad.

Broad-based concerns over TNC misconduct were intensified by news of the International Telegraph and Telephone Company’s (an American TNC) involvement in the coup leading to the death of Chilean President Salvador Allende on 11 September 1973. The corporate image was not helped when more scandal hit the front pages in 1975 and 1976. For business analyst John Kline (1985:23), “While corporations were protesting that the isolated, atypical ITT incident [in Chile] had unfairly tarred the image of MNCs in general, nearly 500 of America’s top corporations were being drawn into disclosures of improper payments abroad” with revelations of bribery of foreign officials, laundered money used for illegal political payments, and secret off-the-book accounts. TNCs, continues Kline (1985:24), “exploded on the American public consciousness in an extremely negative fashion. Imagery created by the ITT and bribery incidents helped paint MNCs as suspicious enterprises given to serious abuse if not closely watched and regulated.”

Public mistrust of corporations within the United States contributed to a regulation-friendly environment that could be capitalized on by labor and other social movements. For business historian Archie Carroll (1999:6), “The late 60s and early 70s was a period during which social movements with respect to the environment, worker safety, consumers, and employees were poised to transition from special interest status to government regulation.” And, as Judith Richter (2001:19) notes, “between 1965 and 1977, the US Congress enacted 20 new regulatory laws governing, for example, occupational health and safety, consumer product safety, clean air, clean water and toxic waste, and created an elaborate regime for assessing environmental impacts and regulating the financial system.” This period is nicely summed up by historian Edwin Epstein (1998:6), who writes that “A critical difference throughout much of the 1960s was that federal and state governments were no longer reluctant to enact laws that transformed general public expectations about business responsibilities into specific legal requirements. A new era in the interaction between business and other sectors of society was emerging.”

This regulation-friendly climate was consonant with the global scene, where post-colonial states were actively seeking the economic and political autonomy *self-determination* promised in name. Salvador Allende’s Chile and some 20 other developing nations passed legislation controlling TNC activities, while nationalization of foreign

corporations reached a peak in the first half of the 1970s (Richter 2001:20). And not only were developing countries nationalizing industries and imposing regulations on foreign capital, they were also pursuing *international* regulation of TNCs. The United Nations became a key venue and vehicle for these organizing efforts. In 1964, developing countries formed the Group of 77 (G-77) at the UN—since expanded to “140 countries and China”—to promote an international agenda and political economy more responsive to their needs.

The G-77 found their break in the OPEC-orchestrated oil crisis of 1973, which emboldened them and strengthened demands for a restructured global economy. According to John Kline (1985:21),

Developing countries had complained before about MNC abuses, even if they were perhaps less dramatic than the ITT incident. The crucial difference now was that the context for complaints changed when developing countries perceived oil resource power as an indication that they finally had some leverage to effect changes in the international economic system.

The first manifestation of their newfound power was the 1974 declaration by the UN General Assembly proposing the establishment of a New International Economic Order (NIEO). The understanding that the “colonially imposed ‘old’ international division of labour coupled with the freedom of capital—that is, unregulated operations of world markets—systematically disadvantages the poorer, ex-colonial countries of Africa, Asia and Latin America” (Hoogvelt with Puxty 1987:162–3) now had the beginnings of an international political program. Binding international codes of conduct for TNCs were a central component of this program. In 1974, the UN Economic and Social Council (ECOSOC) set up the UN Commission on Transnational Corporations, with the UN Centre on Transnational Corporations (UNCTC) as its special research and administrative body, entrusted with three basic tasks: (1) to monitor and provide reports on the activities of TNCs; (2) to strengthen the capacity of developing countries in dealing with TNCs; and (3) to draft proposals for normative frameworks for the activities of TNCs (Richter 2001:9). In 1976, the UN Commission on Transnational Corporations made the formulation, adoption, and implementation of a draft for a *comprehensive and legally binding* UN Code of Conduct on Transnational Corporations one of its top priorities.

The prospect of such international regulation put the global North on serious alert. While the draft code by itself was not a radical threat to the economic interests of the industrialized countries, there was real concern that it might initiate a dangerous dynamic, that “such an international code might gradually evolve into a mechanism which would unduly limit and restrict...the activities which constitute the core responsibilities of business” (McQuade 1976, quoted in van der Pijl 1993:49).

It was soon determined that the “best form of defense against the G-77 onslaught on Western economic interests and values was attack” (Robinson 1983:164). This took the form of an apparent concession, the OECD Guidelines on Multinational Corporations, a voluntary code of conduct. For John Robinson (1983:7), then a business writer, the voluntary guidelines were a

calculated compromise by Western governments between, on the one hand, the need to sensitize firms to their social, economic, and political responsibilities and, on the other, the need to make the rest of the world aware, and in particular the LDCs [less developed countries] negotiating a UN code of conduct for transnational corporations, that the West is not prepared to see excessive constraints imposed on their major creators of wealth: MNCs.

And, he continues (1983:117):

The speed with which the Guidelines moved from conception to decision was dramatic, and was a direct product of the rich world's belief that it had to go into the UN negotiations on multinationals with a coherent and apparently progressive position with which to confront the developing countries' clamour ...for more radical and compulsory control.<sup>3</sup>

To make a long story short, suffice it to say that Northern efforts to derail negotiations of a binding code for transnational corporations were successful. By the time negotiations began on the UN code, in 1977, it had already been turned into a voluntary mechanism. Although a draft was nearly completed by 1981, negotiations stalled and were more or less abandoned a short time later.<sup>4</sup> The simple point here is that the OECD Guidelines were used to forestall the compulsory control being sought through the UN. The year 1976 thus marks the entrance of the voluntary code of conduct into business's strategic repertoire.

We need, however, to clarify two parts of our narrative. First, the voluntary guidelines drafted by the OECD were not the only reason for abandonment of a binding UN code. More important in this regard was the global recession of 1980–82 (the “Reagan Recession”), brought on by record-high interest rates in the United States and Europe, which caused resource prices to collapse and developing country debt to skyrocket. It also eliminated Third World economic leverage and replaced talk of an NIEO with the discipline of “structural adjustment.” The recession also spurred a general move to the right, toward neoliberalism, in both industrialized and developing countries. The latter's economic vulnerability and investment thirst reduced the pressure for comprehensive social regulation.<sup>5</sup> Our simple point is that the first voluntary code of conduct on the global stage—the OECD Guidelines—was meant to forestall the binding regulation of TNCs, even if that was not the primary reason behind the failure of global regulatory efforts in the late 1970s.

John Kline (1985:161) nicely accounts for what business learned about the power of CSR during this period, when he writes that

Events in the 1970s forced MNCs onto the defensive. An opportunity now exists to change this posture into a positive forward outlook and plan of action. One step in this direction is to build a public affairs program that uses the intergovernmental code movement as public guidance rather than just defending against it as possible law. Individual MNC codes can play a vital role in this effort, counterbalancing the use of intergovernmental

codes as political levers while also creating a better understanding of corporate operations that could preclude more restrictive actions in the future.

While some of Kline's recommendations were pursued through the 1980s and into the 1990s, business interest in CSR and codes of conduct faded in the absence of agitation by developing countries, the international trade union movement, and social activists. As we shall see, however, events during the 1990s would again put TNCs on the defensive, and make Kline's "plan of action" more politically pressing.

A second clarification is required regarding the 1960s-1976 period, and our claim that CSR is *business* strategy. As noted above, the official players in the bid for and defense against binding international control of TNCs were developing country *governments*, Northern *governments*, and *intergovernmental* bodies like the OECD and the UN. Where was business in all of this? The international business lobby—working through the Business and Industry Advisory Committee (BIAC) at the OECD—actively participated in the drafting of the OECD's voluntary Guidelines while the International Chamber of Commerce lobbied hard at the UN to derail negotiations on a binding code.<sup>6</sup> Western corporations, however, did not have to push hard on their home governments to resist the UN code. TNCs are great creators of wealth, wealth which flows into state coffers, finances foreign policy objectives, and trickles down to grease class divisions within industrialized societies. There are good structural reasons for industrialized states to defend their corporations on the global stage (Gilpin 1975). But even given this structural advantage, business learned during the 1960s and 1970s that it had to be much better organized at the international level if it were going to secure its interests. Writing about global struggles between business and labor at the end of the 1970s John Robinson (1983:197) noted that

Business's task has been uphill, not just because of the general trend towards interventionism, but because of the nature of the adversary organizations.... Whereas the trade unions are a relatively homogenous group with an organization to match, "business" is in fact a collective misnomer for diversified interests with often only a low common denominator.

In conjunction with the international trade union movement, developing country governments had come very close to establishing a binding code of conduct that would have made doing global business a much more complicated and expensive affair, and this might well have spiraled into more profound transformations of the global political economy. The experience taught business that it should not assume Northern government support, or the support of international organizations such as the UN.

It was thus in the midst of and just after this period of crisis that international business began organizing itself in a sustained way. In 1971, Klaus Schwab established the World Economic Forum (WEF) and in 1973 David Rockefeller established the Trilateral Commission (TLC), while the ICC experienced a spike in membership and support around the same time. These business policy and lobby groups can be said to function, in Gramscian terms, as "collective intellectuals" or agents of the capitalist class "entrusted

with the activity of organizing the general system of relationships external to business itself (Gramsci 1971:6; also see Carroll and Carson 2003:32). Thus, by “business strategy,” we mean the strategies developed by these collective intellectuals. Again, while business organizations were heavily involved in the fight against the UN code, it was that experience which taught transnational corporate capital that it had to become much more organized, that it needed to become a class not only in-itself, but for-itself. Before clarifying the development of this transnational class-consciousness and its concomitant organizations, we would like to briefly address business organizing in the United States in response to the 1960s and 1970s crisis. Not only did this become an important American export, and important to the more “global” story being told here, but it also provides a nicely focused account of business’s rise as a self-conscious political force.

### *“Attack on American Free Enterprise System”*

Our account begins in 1971, when a US Chamber of Commerce memorandum written by Lewis F. Powell Jr.—later to become a Supreme Court Associate Justice—was circulated to top American business executives. The memorandum, entitled “Attack on American Free Enterprise System,” articulates business’s political program of the past 30 years. We are not proposing that American business followed Powell’s suggestions programmatically. The memo does, however, brilliantly articulate a set of concerns and responses that were circulating widely at the time.

Powell’s basic argument, like John Robinson’s, was that business was losing the battle for American hearts and minds (1971, unpaginated):

We are not dealing with sporadic or isolated attacks from a relatively few extremists or even from the minority socialist cadre. Rather, the assault on the enterprise system is broadly based and consistently pursued. The most disquieting voices joining the chorus of criticism come from perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians.<sup>7</sup>

While Powell’s memorandum showed appropriate disdain for business’s adversaries, it evinced respect for their ideological and organizing prowess. What progressives had that business lacked, Powell claimed, was cohesion. And this cohesion stemmed from a common project: the radical upheaval or at least radical reform of the free enterprise system. By focusing on “the system” instead of just individual symptoms (chemical pollution, low wages, unsafe products), he argued, progressives have forged powerful alliances among different social movements.

If progressives found strength and cohesion decrying the system, business could find the same in defending it: “If our system is to survive, top management must be equally concerned with protecting and preserving the system itself....” For Powell, this had to be a collective project (ibid.):

independent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in

careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.<sup>8</sup>

Powell's advice was heard. According to journalist Thomas Edsall (1990:248):

From 1971 to 1979, the number of corporations represented by registered lobbyists grew from 175 to 650...The National Association of Manufacturers moved to Washington in 1973...chief executive officers of Fortune 500 companies formed the Business Roundtable in 1972. Membership in the Chamber of Commerce more than doubled, from 36000 in 1967 to 80000 in 1974.

For Powell, business's newfound organization and power should be directed toward two fronts: US culture and US politics. We might reasonably doubt that Powell ever read Gramsci's *Prison Notebooks* (1971), but his plan of action resonated deeply with Gramsci's thinking on the modern political terrain, nicely summarized by Margaret Kohn (1999:218–19), who writes that

[Gramsci] realized that unlike Russia's absolutist state, the modern bourgeois state was fortified by institutions like the church, school, political parties, and media.... In order to build a counter-hegemonic bloc, the socialist vanguard had to also fight on the terrain of civil society and create a new cultural/ moral vision capable of unifying workers and peasants. Socialism had to become the new common sense, embodied in institutions, practices, and beliefs.

On the cultural front, Powell argued that business needed to make its presence felt more in the Academy, on television, and in other news media—what he saw as bastions of “liberal” and even “left” thought. Again, his advice was heeded. The period after Powell's memo marked

growing corporate grants to the Public Broadcasting System, from \$3.3 million in 1973 to \$22.6 million in 1979; the key role of corporate-funded foundations in the financing of Jude Wanniski's *The Way the World Works* and George Gilder's *Wealth and Poverty*; grants to the Heritage Foundation and the American Enterprise institute; the endowment between 1974 and 1978 of forty “free enterprise” chairs primarily at liberal undergraduate colleges.

(Edsall 1990:248)

And, like Gramsci, Powell felt this cultural war should be guided by political ends (1971, unpaginated):

...one should not postpone more direct political action, while awaiting the gradual change in public opinion to be effected through education and information. Business must learn the lesson, long ago learned by labor and other self-interested groups. This is the lesson that political power is necessary; that such power must be assiduously cultivated; and that when necessary, it must be used aggressively and with determination—without embarrassment and without the reluctance which has been so characteristic of American business.

Learning from labor, corporations began organizing Political Action Committees—which had previously been the preserve of unions. According to Thomas Edsall (1990:131),

During the 1970s, the political wing of the nation's corporate sector staged one of the most remarkable campaigns in the pursuit of power in recent history. By the late 1970s and the early 1980s, business and Washington's corporate lobbying community in particular, had gained a level of influence and leverage approaching that of the boom days of the 1920s.... In 1974 there were 89 corporate PACs, in 1978 there were 784, and by the end of 1982 there were 1,467 Labor PACs, in turn, grew only from 201 to 380 in the period from 1972 to 1982.

Powell ends his memo ominously: "It is time for American business—which has demonstrated the greatest capacity in all history to produce and to influence consumer decisions—to apply their great talents vigorously to the preservation of the system itself (1971, unpaginated). Needless to say business has succeeded in its charge.

The problems faced by business in the United States—vigorous social movements and a regulatory state—were also shared by business globally. We are now better positioned to account for the rise of a global business consciousness and its related organizations—a process that borrowed from and contributed to the more American story we've just told.

### **Global business becomes *global* business**

Writing about the 1960s and 1970s, Stephen Krasner (1985:124) noted how "The South has been able to take two legacies of the North—the organization of political units into sovereign states and the structure of existing international organizations—and use them to disrupt, if not replace, market-oriented regimes over a wide range of issues." The business response to this more global crisis was not perfectly coherent. A main line of tension, speaking generally, was between the *money* and *productive* capitalist fractions. To explain this difference, and the forging of a more global perspective for business, a theoretical digression is required.

For political economists Henk Overbeek and Kees van der Fijji (1993:3),

Fractions of total capital are aggregates of capitalist interests which crystallize around a particular function in the process of capital accumulation.... *Money Capital*...represents the total quantity of



commodities, and which is at the same time the most general and abstract form of capital. *Productive capital*, even as an abstraction, always refers to tangible “factors”: human labour, raw material, means of production.

Functionaries of the money fraction include investment bankers, while industrialists better represent the productive fraction. Giovanni Arrighi (1996:5) nicely articulates some of the general differences between money and productive capital in his restatement of Marx’s general formula of capital:

MCM’. Money capital (M) means liquidity, flexibility, freedom of choice. Commodity capital (C) means capital invested in a particular input-output combination in view of a profit. Hence, it means concreteness, rigidity, and a narrowing down or closing down of options. M’ means *expanded* liquidity, flexibility, and freedom of choice.

For Overbeek and van der Fiji, money capital’s more general perspective on markets—its more universal class outlook—interests it in definitively capitalist projects such as the opening of new markets, deregulation of existing markets, and reduction of barriers to trade and investment. Simply put: If your business is buying and selling money, you want as much flexibility and freedom of movement for your product as possible. Productive capital, by contrast, has tended to be more parochially minded. It has historically sought barriers to trade—barriers meant to protect domestic industry from foreign producers. This barrier-seeking peaked in the US context with the 1930 Smoot-Hawley tariffs. But tariffs are not the only kind of protection productive capital has sought. Its literal boundedness and spatial fixity, exemplified in the factory, have put productive capital in closer proximity to tangible factors of production, including human labor and raw materials. This proximity has predisposed it to the protection of the human labor and natural environs that appear to money capital as “non-market, non-value aspects of the productive process and its immediate social setting” (Overbeek and van der Fiji 1993:4). In other words, productive capital has tended to be more friendly towards the protective social regulations that money capital has been historically interested in avoiding or removing.

Karl Polanyi’s analysis helps clarify the distinctly capitalist quality of productive capital’s protective impulse. He thus complicates Overbeek and van der Pijl’s general account of the more truly capitalist money fraction and the more parochially minded productive fraction. In Polanyi’s terms, money and productive capital represented the two sides of the “double movement” that has historically characterized market societies (see Chapter 3); as he put it (2001:79),

Social history in the nineteenth century was thus the result of a double movement.... While on the one hand markets spread all over the face of the globe and the amount of goods involved grew to unbelievable dimensions, on the other hand a network of measures and policies was integrated into powerful institutions designed to check the action of the market relative to labor, land and money.

His innovative and critical point was that incredible work was required to commodify the fictitious commodities of labor and land, work that markets could never do on their own. Historically, organized political intervention has always been a prerequisite for the establishment of “free markets”; as he put it (2001:145) “There was nothing natural about *laissez-faire*; free markets could never have come into being merely by allowing things to take their course...*laissez-faire* itself was enforced by the state.” Furthermore, not only was state intervention integral to the constitution of markets, of greater importance for Polanyi was the need for public regulation to ensure that markets do not destroy what makes them possible in the first place: commodified land, labor, and money. There is no logic internal to the market that would keep it from exploiting land and labor in profoundly unsustainable ways. Indeed, with profit as the market’s primary engine, there is incentive to extract as much as is humanly and environmentally possible. But both labor and land have natural limits, and it is these limits that, for Polanyi, make the purely free and self-regulating market impossible. If these limits are transgressed, markets will destroy their very own bases for existence. States must therefore intervene to protect labor and land, and to ensure that markets do not destroy themselves and society, too.

This intervention, or “counter-movement,” is impelled by a confluence of social forces. What we now call “social movements” have been important sparks for protective counter-movements but so, too, has business. Indeed, Polanyi provides ample historical evidence of *laissez-faire* proponents inside and outside of government pursuing interventionist policies without any pressure from social movements. Historically, even devout capitalists—mostly of the productive ilk—have understood the fundamental limits to labor and land’s commodification, and have pushed for state intervention. Thus, the brokering of the New Deal in the United States, and its corollaries in other industrialized countries, had the support of productive capital, whose view, especially following the Great Depression, was dominant until the 1950s (Overbeek and van der Pijl 1993).

The crisis of the 1960s and 1970s threw productive capital’s protective impulse into relief. Instead of serving to strengthen and enable the free market system, the welfare state had apparently enabled demands that, for business, or “total capital,” were looking increasingly illiberal both nationally and internationally. Socialism was only a distant fear. The more imminent concern was the use of the state to more tightly regulate capital domestically and internationally. From capital’s perspective, the state was suffering a reverse “legitimation crisis.”<sup>9</sup> Instead of revealing its “inherently capitalist nature,” the state appeared open—domestically and internationally—to social demands of an uncapitalist, or highly moderating, nature. And this opening appeared to be emboldening social forces and enabling even more radical demands. The state was proving a useful weapon in the “Attack on American Free Enterprise System” (Powell 1971).

It was in the face of this common threat that traditional tensions between money and productive capital subsided. This new unity of historical fractions was abetted by transformations in the production process. A more global business outlook had traditionally been the preserve of money capital, but productive capital was finding it increasingly profitable to globalize. Technological advances in transport, telecommunications, and automation enabled the globalization process, but what we term “globalization” is also a *project*, the result of conscious political decisions (Went 2000:53). According to Robinson and Harris (2000:27), one of the primary reasons for globalizing production was to weaken domestic labor demands—demands that were

posing serious problems for capitalist accumulation and that were partly enabled by productive capital's protective impulse itself. As we saw in Chapters 2 and 4, by moving or outsourcing production to where labor costs were cheaper, domestic labor's bargaining position was weakened and more profit could be accrued.

In the 1960s and 70s post-colonial states were not only defending against this capitalist "utopia," but were moving to restructure the global economy in profound ways. It was in this context of the failed protective impulse in the North (intensive worker organizing, social movement, and an increasingly regulatory state), the resulting push for globalized production, and the increasing power of Third World states *that a new capitalist consensus developed around the traditionally money capital position—the opening of new markets and deregulation of existing ones*. While the economic liberalism of money capital had enjoyed earlier periods of prominence—during much of the nineteenth century for instance (Polanyi 2001:3–35)—conditions during the late 1970s were novel. The primary difference now was that the globalization of production was contributing to the formation of a new transnational capitalist class (TCC)—one unmoored from the protective impulse of nationally bounded production. For Robinson and Harris (2000:17, 12):

As national productive structures...become transnationally integrated, world classes whose organic development took place through the nation-state are experiencing supra-national integration with "national" classes of other countries...[and include] transnational corporations and financial institutions, the elite that manage the supranational economic planning agencies, major forces in the dominant political parties, media conglomerates, and technocratic elites and state managers in both North and South.<sup>10</sup> (See also Sklair 2002; van der Fiji 1998.)

Our focus here is on "supranational economic planning agencies." This phrase references both multilateral economic institutions like the International Monetary Fund, the World Trade Organization, the World Bank, and the OEGD, and business planning forums like the World Economic Forum (WEF), the Trilateral Commission (TLC), and the International Chamber of Commerce (ICC) that are, formally speaking, not part of state apparatuses. More particularly, our focus is on the role of these latter "agencies," mainly the ICC, in articulating global business's vision and strategy.

Global business planning forums are both the product of and precondition for a transnational capitalist class. While organizations like the WEF are enabled by transformations in the production process, they are also integral to the articulation of class-consciousness; it is these organizations that have made the TCC a class not only in-itself but also for-itself. For William Carroll and Colin Carson (2003:37), global business planning forums "provide intellectual leadership that is indispensable in the ongoing effort to transform transnational capital from an economically dominant class to a class whose interests take on a sense of universalism." We are not claiming that these forums dictated the business fight-back against public encroachments on its interests in the North and the South; that was more an "accumulation of tactical responses" (Zinn 2003:59) than the product of centralized strategy making. But business policy forums *have* played

a crucial role—one that has increased over time—in articulating a self-conscious political program for global business.

What was this program? It is worthwhile, in this regard, to recall business writer John Robinson's doldrums at the end of the 1970s. Not only did he worry (1983:197; our emphasis) that "global business" was only a "collective misnomer for diversified interests with often only a low common denominator" but also that "*there is no binding ideological force which is such a cohesive element as in the trade unions' organization.*" Robinson's concerns are jarring for the current reader. As we well know, a new ideological specter was haunting the world. If the trade union and developing country position could be termed "social democratic," the business position was "neo-liberal." If the strategy of the former was to use the state to better regulate Western capital in its home countries, moderate its effects in the global South, and work through international organizations to reform the global political economy itself, the neo-liberal position was to use the state to deregulate markets in the North, open and deregulate markets in the South, and work through international organizations to reform the global political economy itself.

But neo-liberalism was not merely reactive. As Stuart Hall remarks (quoted in Overbeek and van der Fiji 1993:14) in regard to its appearance in the United Kingdom,

If the crisis is deep—"organic"—these efforts cannot be merely defensive. They will be *formative*: aiming at a new balance of forces, the emergence of new elements, the attempt to put together a new "historic bloc," new political configurations and "philosophies".... These new elements do not "emerge": they have to be constructed. Political and ideological work is required to disarticulate old formations, and to rework their elements into new ones.

Part of what makes neo-liberalism formative and "neo" is its attempt to stall the previously *capitalist* impulse to protect the very bases of markets (labor and land) from commodification-to-death. As noted, this requires a radical, although uneven, reformulation of the categories "human" and "nature." This reformulation requires sustained cultural, ideological, political, and economic work on a multiplicity of scales. We cannot account here for all of this multi-frontal and leveled work. Our focus is more general: on neo-liberalism as a global politiceconomic project that "seeks to achieve the conditions in each country and region of the world for the mobility and free operation of capital" (Robinson and Harris 2000:41).

While we agree with Overbeek and van der Pijl (1993:15) that "neo-liberalism is the fundamental expression of the outlook of transnational circulating capital," we are not claiming a passive role for the state in this story. There are structural incentives for rich countries—especially hegemons like the United States—to actively pursue a "liberal world economic order" (Gilpin 1975:142; see also Lake 1983). Our claim is that events in the 1960s and 1970s—mainly regulationist claims being made on the state in the North, South, and globally—jarred business into sustained self-organization and prompted the emergence of a *radical* political program—neo-liberalism—that could not have been so vigorous in content and pursuit without business's sustained self-organization.<sup>11</sup> Voluntary codes of conduct would not become a crucial part of the neo-liberal program

until the 1990s. We submit, however, that the threat of a binding UN code contributed significantly to neo-liberalism's constitution. For van der Pijl (1993:54), "the threat and the transformative potential of the code of conduct challenge were sufficiently well perceived to fuel a vehement counteroffensive along a much broader front." And so they did.

### History's sequel (1998-present)

The 1980s were a decade of relative calm for transnational corporate capital. The Berlin Wall gave way, the Soviet Union disintegrated, and for many commentators any alternative to the capitalist mode of production and social organization vanished (e.g. Fukuyama 1992). But while the 1990s were supposed to be the end of history's happy beginning, transnational corporations quickly became lightning rods for global protests against the neo-liberal consensus and its deleterious effects: plant closures in the North, brutal labor conditions in the South, unrestricted exploitation of environmental resources worldwide, human rights abuses, corporate concentration, shrinking democratic accountability, etc., etc. Richard Howitt, a member of the European Parliament, provides a nice summary (2002: xiii) of recent anti-corporate activity:

[The] early 1990s saw a stream of exposes of sweatshop conditions within the supply chains of major US clothing suppliers, in particular in Central America. Royal Dutch Shell was attacked relentlessly for its role—or lack of it—in relation to the killing of Ken Saro-Wiwa and oppression of the Ogoni people in, then, non-democratic Nigeria. The 1998 Soccer World Cup was skilfully exploited by activists to highlight child labour in South Asia's sportswear industry.

In North America, popular frustrations over corporate rule and power crystallized on 30 November 1999, when some 60,000 people flooded the streets of Seattle and succeeded in shutting down meetings of the WTO's Third Ministerial.<sup>12</sup> The popularity of the anti-corporate sentiments impelling the mass demonstrations was confirmed by a *Business Week* poll conducted during September 2002. Pollsters asked Americans what they thought of the statement "Business has too much power over too many aspects of our lives." More than half (52 percent) said they "strongly" agreed while an additional 30 percent said they agreed "somewhat" (Nace 2003:10). This is powerful sentiment, especially from the putative beneficiaries of the "liberal world economic order."

Popular anti-corporate sentiments in the United States were strengthened when the Enron scandal hit the front pages. For five years running, Enron had been named "most innovative" company by none other than *Business Week* magazine (Nace 2003:178). Enron was the seventh largest company in the nation and a favorite, and supposedly secure, investment for various employee pension and retirement plans. Toward the end of 2001, however, the company went bankrupt, its primary innovation having turned out to be creative accounting that enhanced the company's financial appearance and inflated its stock price. When financial reality finally caught up with appearance, thousands of Enron employees lost their jobs *and* retirement savings. Many thousands more working

Americans were impacted.<sup>13</sup> Enron might have been written off as an unfortunate exception to the rule of corporate responsibility, but “by July 2002, the scandal sheet included over a dozen corporations, including Adelphia, AOL Time Warner, Arthur Andersen, Bristol-Meyers Squibb, Global Crossing, Halliburton, Johnson & Johnson, Qwest Communications, Tyco, WorldCom and Xerox” (Nace 2003:179). Investors as well as those Americans whose retirements were dependent on healthy stock prices—people who may not have been “anti-corporate” before—now had immediate reasons for demanding more government control over corporations.

In its own defense, business has predictably turned to a trusty tool in its repertoire of contention. “In an era when reputation began to exceed all other factors in determining company sales and value,” Richard Howitt (2000: xiii) writes about the past decade, “executives could not afford to wait for a change in the political wind. The more enlightened ones began to admit to the problem, and say only they could do something about it.” Taking a leaf from Christian evangelicals, Corporate Social Responsibility was “born again.”

The corporate code of conduct became a favored business response to threatened profits and remains so. Whether in response to direct criticism or in scrambles to avoid that criticism, corporations worked hard through the 1990s to stem growing frustration with corporate abuses. According to Naomi Klein (2000:430), all of the decade’s major corporate codes were drafted by public-relations firms in the wake of threatening media investigations:

Wal-Mart’s code arrived after reports surfaced that its supplier factories in Bangladesh were using child labor; Disney’s code was born of the Haitian revelation; Levi’s wrote its policy as an answer to prison labor scandals. Their original purpose was not reform but to “muzzle the offshore watchdog” groups, as Alan Rolnick, lawyer for the American Apparel Manufacturers Association, advised his clients.

Every major corporation now has a code of conduct or at least makes mention of commitments to social responsibility on its web site and in shareholder literature. Indeed, corporate social responsibility (CSR) has become a growth industry. Writing about the past decade, Dwight Justice (2002:99) of the International Confederation of Free Trade Unions (ICFTU) notes how

CSR moved from a concept to become an industry as consultants and enterprises emerged, offering CSR services to business. Among these services were social auditing and reporting as well as “risk assessment” services.... The trade union concern with this industry is that it is assisting business in redefining the expectations of society instead of responding to them.

Business has been intent on such redefinition since labor and social activists have been working to capitalize on popular discontent and lobby for more market regulation nationally and globally. For example, one of global civil society’s more challenging regulatory moves through the 1990s was global labor’s attempt to link “the ILO with the

WTO, hoping that the ILO's rights-oriented culture might join with the WTO's enforcement power and sanctioning process" (Monshipouri 2002:26). Ian Hurd (2003:103) nicely outlines the WTO's appeal to labor activists:

The WTO is a strong intergovernmental organization with a clear mandate to review domestic regulation in member states and issue legally binding remedies when states violate the set of agreed-upon rules. This appears to satisfy the institutional structure that many labour-standards advocates seek. Adding new rules to this set (perhaps, for instance, on hours of work or the right to unionize) seems a smaller task than creating an entirely new organization and might be able to take advantage of the unusually strong disputesettlement mechanisms already built into the WTO.

These "new rules" the labor movement has sought to have enforced are the ILO's core labor standards, including freedom of association, the right to collective bargaining, abolition of forced labor, prevention of discrimination in employment, and a minimum age for employment (O'Brien 2000:83; see also Table 4.2). The key to having these standards embedded in the WTO is, as explained by Robert O'Brien (2000:83), that "for the first time they would become enforceable and not depend on the whims of individual states. Labour wanted the WTO Sheriff to include core labour standards on its beat." Labor's bid was, ultimately, defeated but the effort was reminiscent of the earlier actions within the UN and caused grave concern in the business community.<sup>14</sup>

One way of acknowledging concern about labor rights without compromising capital accumulation is, of course, the voluntary code of conduct. According to a 1997 editorial in the *Journal of Commerce* (quoted in Klein 2000:437), "The voluntary code helps defuse a contentious issue in international trade negotiations: whether to make labor standards part of trade agreements. If...the sweatshop problem is solved outside the trade context, labor standards will no longer be tools in the hands of protectionists." Two of the most prominent organizations business has partnered with to solve "the sweatshop problem"—a phrase that serves as a synecdoche for all of neo-liberal globalization's externalities as well as the protests they impel—have been the OECD and the UN. It was in these organizations that the battle over compulsory vs. voluntary regulation was fought in the 1970s; it is in these organizations that it is being fought again today. The primary difference between then and now, however, is that today *both* the OECD and UN are on the same side: that of business and the voluntary code of conduct.<sup>15</sup> Stranger yet, while the OEGD offered up its relatively vacuous voluntary Guidelines on Multinational Corporations in 1976 *as a counter* to the UN's binding code of conduct, the OECD's current Guidelines are much more stringent than the UN's most recent contribution to the regulation debate, the Global Compact.

Linking together the OECD Guidelines and UN Global Compact is the significant contribution made to each by the International Chamber of Commerce. The ICC is not the sole author of these documents but, as we shall see, its vision is deeply etched into both. Carroll and Carson (2003:53) nicely articulate the relationship between business policy forums like the ICC and more formal political bodies like the OECD and UN:

[Business policy forums] operate at one remove from the structural adjustment programmes, “poverty reduction strategies” and other enforcement mechanisms, including the capacity for military intervention, that are the province of statist bodies, whether national or international. They foster discussion of global issues among members of the corporate elite, often in combination with other influential political and professional elites. They facilitate the formation of a moving elite consensus that is framed within one or another variant of neo-liberal discourse. They educate publics and states on the virtues of the neo-liberal paradigm. In sort, they are agencies of political and cultural leadership, whose activities are integral to the formation of a transnational capitalist class.

The ICC, which calls itself the “voice of world business,” has been the business organization most invested in the strategic deployment of codes of conduct.<sup>16</sup> In what follows, we track the role that both the UN and OECD, with significant prodding from the ICC, have played in forestalling a sustained and legally binding regulatory solution to the global “sweatshop problem.”

### *OECD Guidelines redux*

What the original OECD Guidelines for Multinational Enterprises had in common with the UN’s proposed code of conduct was the recognition that unregulated business activity was causing serious social and environmental externalities. Where the Guidelines differed, however, was in the absence of mechanisms for ensuring that these problems would be addressed in a sustained way. Summing up the gist of the OECD’s original guidelines, Susan Aaronson and James Reeves (2002:11) note that “firms would not abuse citizens or the environment in these [OECD] countries, and governments would not try to control these firms.” Business, as the current flurry of debate on CSR suggests, did not keep its end of the bargain. But, as noted, the economic staginations of 1973–75 and 1980–82—primarily the latter—helped weaken public pressure on business and government and changed the terms of the international regulation debate. For John Robinson (1983:46), the

shifting emphasis of the OECD...from control of multinational companies to encouragement of international investment is now a central part of the strategy of those who, like the US administration, believe that there has been undue stress laid to date, and certainly up until the 1979 review of the Guidelines, on the “negative” or control aspects of the decisions taken by the OECD council

With the specter of regulation exorcised, the discourse and practice of corporate social responsibility subsided—there is little incentive for business to concern itself with ethics when its conduct is not being heavily scrutinized. While the OECD Guidelines went under review in 1979, 1982, 1984, and 1991, no significant changes were made in them.

This all changed in 1998, when, write Aaronson and Reeves, “the OEGD again began a review to make the Guidelines more useful and effective” (2002:11). The stakes in that



review were much higher than in the four previous ones for, during that same year, the OECD suffered a major political setback with the collapse of talks it was hosting on the Multilateral Agreement on Investment (MAI).<sup>17</sup> Global civil society's apparent defeat of the MAI stunned OECD ministers. After the talks had collapsed, Canadian Trade Minister Sergio Marchi remarked that "the lesson he has learned is that 'civil society'—meaning public interest groups—should be engaged much sooner in a negotiating process, instead of governments trying to negotiate around them" (Perlas 2000, unpaginated).

The OECD responded predictably to the collapse of the MAI and the emergence of a new global protest movement; it revamped its Guidelines for Multinational Corporations. Overnight, moreover, the OECD moved from a strategy of exclusion—the MAI had been negotiated in secret—to one of accommodation. Civil society organizations that had rallied their constituents against the OECD were now invited to the bargaining table for a high-stakes review of the Guidelines. Aaronson and Reeves (2002:12) nicely describe this redrafting process:

The OECD adopted an unusual approach to revising the Guidelines. It hoped to build a broad international constituency by involving a wide range of groups and giving them a stake in the development and implementation of its code.... Each group organized and presented a common position to the negotiators and OECD staff.... Among the civil society groups involved were World Wildlife, Amnesty International, Friends of the Earth, Traidcraft Exchange, and SOMO of the Netherlands. In this way, the OECD embraced a new strategy for the development of international public policy, with a different approach to transparency and public participation.

Even with the OECD's inclusion of civil society, however, and the specter of regulation on the streets and the Internet—a rallying cry of the anti-MAI protests was that we must "bring the rule of law to global capital" (Clarke and Barlow 1998:4)—business gave up very little in the redrafting.

On the surface, the revamped Guidelines look promising. Covering nine areas of business conduct, including labor, environment, human rights, and information disclosure, they are more comprehensive than most other codes of conduct (Ethical Corporation 2003).<sup>18</sup> They are also the only multilaterally endorsed code of conduct for TNCs (Gordon 2001:2). According to the OECD, "while observance of the recommendations by enterprises is purely voluntary, adhering governments sign a binding decision to participate in Guidelines implementation and to promote their observance by enterprises operating in or from their territory" (Gordon 2001:9). OECD governments implement the Guidelines through National Contact Points (NCPs) responsible for promoting the Guidelines, handling inquiries, and helping to resolve issues that arise.<sup>19</sup>

Those NGOs that participated in the redrafting were quick to highlight their concerns in a 6 June 2000 document published soon after the new Guidelines (NGOs 2000):

Whilst we would prefer to see the text strengthened further, the key test of the Guidelines is their implementation. If adhering Governments fail to implement the Guidelines vigorously, transparently and effectively world-wide, then NGOs will be left with no option but to actively and publicly oppose the Guidelines.

They conclude (*ibid.*) that “unless implementation is conducted in good faith there is a real risk that the Guidelines will be used to justify behaviour and practices by multinational enterprises which undermine sustainability.” It is important to consider what “implementation” means in the context of nonbinding Guidelines. At best, it means the enactment of a well-resourced National Contact Point that will vigorously promote the Guidelines and provide an impartial venue for citizens and organizations that want to report irresponsible corporate behavior. “Implementation” does *not* entail active enforcement or the punishment of wrongdoers. Since the text is non-binding, “breaking” the Guidelines is legally impossible. Thus, NGO support for the agreement hinges more on active promotion of the voluntary Guidelines than their enforcement. Even with these minimal criteria for support, NGO threats have not been heeded. “As of this January 2002 writing,” report Aaronson and Reeves (2002:13),

many governments, such as the United States and Mexico, are doing virtually nothing or very little to implement the Guidelines. If, as example, the U.S. does nothing, most citizens will not pressure it to do more, because most Americans have no knowledge that the U.S. and other governments have ever agreed to implement such a code.

As a result, civil society is growing increasingly wary of the OECD but remains hopeful that the Guidelines will be useful for both short-term campaigning and a longer-term bid for an international and binding regulatory framework. The rationales for civil society’s exuberant patience were outlined at a recent “NGO Training and Strategy Seminar on the OECD Guidelines for Multinationals” (see Smith 2003). A strategic point made at the seminar was that, even with their nonbinding quality, the fact that the Guidelines are endorsed and supported by governments provides some leverage to those wanting to push for more sustained market regulation. For Peter Pennartz (quoted in Smith 2003:2) of the International Restructuring and Education Network Europe (IRENE), the “Guidelines provide an opportunity to drag governments back into the arena of corporate social responsibility and pinpoint governments again at their responsibilities towards civil society.”<sup>20</sup> Beyond this larger strategic reason for continuing to use (and tacitly support) the Guidelines, the general consensus at the seminar was that, since the Guidelines exist, they were worth testing: “the vast majority of participants voted in favour of continuing to use and develop the OECD Guidelines as an instrument in the toolbox for campaigning” (Smith 2003:2). There is thus a long-term (gateway to binding international framework) and short-term (immediate improvements in corporate conduct) rationale for working with the Guidelines. But one possible outcome of the consensus expressed at the NGO seminar is that civil society support for the Guidelines will forestall the longer-term vision of a binding international framework while providing few

short-term payoffs. This concern was voiced at the seminar by Matt Phillips (quoted in Smith 2003:7) from Friends of the Earth who

looked at the wider picture of campaigning which only brings success at the local level and argued for the need to drive a bigger picture of global change which needs binding international rules. He expressed concern about pursuing lots of cases through the OECD Guidelines and the danger that we will only get a whole set of ambiguous outcomes that don't give us any big change to the global development model.

To unpack the argument that support for the Guidelines will compromise bids for a binding regulatory framework, we need to analyze the OECD's logic in drafting the Guidelines. Its strategy is clearly one of co-optation through limited accommodation. One gets a sense of this in a statement made at the NGO seminar by Andre Driessen from OECD's Business and Industry Advisory Council, as summarized here by rapporteur Julie Smith (2003:8; our emphasis):

He sees the Guidelines as a two-way process and doesn't relate to them as a problem, he sees them as a solution.... Andre concluded by saying that the debate can continue but the Guidelines should be used for what they are they are a *compromise*. If we only focus on enforcement a whole part of the Guidelines will be lost.

But what has business actually compromised in the redrafting process? What has business given up in order to convince civil society this was a largely legitimate and worthwhile process? Business has made two compromises that have captured the interests of civil society. The first is simply admitting the problem—that corporate conduct has often been unethical during the past decade and that a remedy is required. The second is agreeing that government should play some role (even if extremely limited) in that remedy—the regulation of corporate conduct. Let us consider each compromise in turn.

#### *Ceding ethical ground/acceptance of progressive norms*

This compromise is not meaningful, for it subjects business to ethical considerations beyond the bottom line and not previously within its purview. And, as already mentioned, condemning an organization for unethical behavior is easier when said organization has already and openly agreed that ethical behavior is virtuous.<sup>21</sup> The danger with business's admission of a spotty ethical record and its acceptance of progressive norms, however, is that it takes the sting out of civil society's accusations. In doing this, business has destabilized the ethical ground from which civil society garners its authority (Wapner 1996; Keck and Sikkink 1998). Progressive terms have been vacated of meaning while retaining their significance. That is, "sustainability" or "human rights" continue to *signify* responsibility and ethical progressivism to the constituents and consumers targeted by business, while *referring* to barely responsible and often irresponsible behavior. Business has assumed civil society's progressive language without assuming the accompanying practices or policies. In plain terms, business "talks the talk" *so as not to* "walk the

walk.” Indeed, by overtaking the talk, retaining its significance while vacating its content, business changes what it actually means to walk the walk in the first place. While civil society organizations have had some success capitalizing on this contradiction, business has been the big winner from the “compromise,” understanding better than most, especially in our increasingly media-driven world, that signs often matter more than referents.

### *Governments and implementation*

The OECD, sensitized to the power of a disgruntled public in the late 1990s, understands that, without an emphasis on implementation and enforcement, codes of conduct lack legitimacy. The OECD’s primary challenge in drafting the Guidelines was to solve the legitimacy problem—providing for some level of implementation and enforcement—without shifting the policy paradigm away from voluntary mechanisms. To fully grasp the OECD’s challenge, we need to consider the series of studies they commissioned on corporate codes of conduct during, and just after, reviewing and redrafting the Guidelines (OECD 1999, 2001a, 2001b; Gordon 2001). These are authoritative studies cited by both sides of the regulation debate. While the OECD’s research is ideologically inflected the organization is definitively on the voluntary side of the regulation debate these studies can be read as an immanent critique of voluntary regulation in general. They cannot hide that voluntary codes of conduct are ineffective at regulating corporate behavior.

In “Codes of Corporate Conduct: An Inventory” (OECD 1999), OECD researchers surveyed and analyzed 233 codes of corporate conduct. The OECD reports there that it is interested in codes because they “represent a relatively new way of addressing *certain issues* through mainly nongovernmental bodies in ways that seek little direct impact on trade or investment flows” (1999:4; our emphasis). But the contents of the report suggest that codes of conduct have little direct impact on those “certain issues”—human rights abuses, environmental destruction, morbidly low wages—they are meant to address. According to these same researchers (*ibid.*: 17),

A significant number of company and business association codes included in the inventory do not touch on the subject of monitoring at all. Where company codes have relevant provisions, almost all state that in-house staff will oversee implementation of and compliance with the code’s standards—both by the company that issues the code and by its suppliers and other business partners. In other words, companies tend to prefer internal procedures or remain silent on this issue.

And, they continue, “*The effectiveness of codes in influencing the behaviour of corporations depends also on a strong enforcement mechanism....* Not all of the codes surveyed describe responses to breaches of code in great detail” (*ibid.*: 18; our emphasis). A strong enforcement mechanism would entail external monitoring by a second or third party with some punitive powers. But, according to a subsequent OECD report on CSR (2001b:11), “External monitoring is the least used implementation technique examined—only two percent of the company codes mention it.” Such weaknesses in most of the private initiatives in play are a worry for the OECD. Codes of conduct have the potential

to assuage civil society's concern about corporate (mis)conduct while minimally impacting trade or investment flows. But for private initiatives to satisfy (or at least distract) NGOs and labor, they must, *at a minimum*, speak the language of implementation and enforcement. That is the beauty of the OECD Guidelines. They are voluntary and non-binding while simultaneously emphasizing the importance of implementation. As with assumption of ethics-speak, business is busy recuperating the meaning of implementation. "Implementation" still signifies monitoring and enforcement even as it refers to the same old non-binding arrangements. And with the assumption of "implementation-speak," the OECD can claim impressive advances in the field of CSR. In the OECD's most recent study, *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison* (Gordon 2001), researchers smugly report (ibid.: 7) that,

by adding the weight of adhering governments' views to the general public debate on many issues in international business ethics, the Guidelines process has already succeeded in raising the legitimacy and profile of corporate attempts to address these issues. The Guidelines implementation procedures have also been enhanced, especially in relation to the functioning of the National Contact Points. They remain unique.

The problem, as noted, is that large segments of civil society agree.

In a recent presentation to the National Policy Association, Pieter van der Gaag of the Northern Alliance for Sustainability (ANPED) noted (2001:3) that, compared to other CSR initiatives, the Guidelines are an impressive regulatory mechanism:

The OECD Guidelines...may have a bigger chance of bringing us the needed fast improvements. The OECD guidelines are a more detailed and complete document.... What is also needed is the systemised nonthreatening dialogue that is offered by the implementation mechanism of the OECD Guidelines. The value of the different perspectives that are brought in while dealing with difficult issues like supply chain responsibility, implementation on the corporate level of the precautionary principle, human rights, whistleblower protection, and some of the other difficult points in the guidelines will start creating the common understanding needed to build good policy on.

Van der Gaag has apparently accepted the OECD's implementation "compromise," along with the consensus language preferred by OECD's Business and Industry Advisory Committee. He still believes that government regulation is the only way to ensure corporate responsibility but thinks that the OECD Guidelines, and the forums for exchange it establishes between civil society, business, and government, can lead to such regulation. His strategy (ibid.: 5) is made clear here:

A combination of worldwide standardized information gathering and verification and multistakeholder dialogue will finally put in place the

decision-making mechanism to create and protect sustainable societies. A start should be made with further developing the real-world...OECD Guidelines to effective, detailed global standard systems that generate the information needed and provide the space for networked information sharing and dialogue.

At the root of this strategy is the hope, which the Guidelines stoke, that through friendly dialogue corporations and governments will be convinced to change their behavior and accept the civil society call for an international and binding regulatory framework. But speaking generally, this hope flies in the face of one of history's most important lessons: that social and political change comes more from confrontation and challenge than friendly conversation between adversaries (Richter 2001:205). More specifically, van der Gaag's hope contradicts the history told here, that voluntary mechanisms have been consistently invoked to prevent, not abet, binding regulation.

It is interesting to note, however, that, while van der Gaag is supportive of the Guidelines, he is very critical of most other CSR mechanisms. The other high-profile mechanism he addresses is the UN's Global Compact (which we discuss in further detail on pp. 157–64). For van der Gaag (2001:3):

The global compact and its UN Agency spin-offs are, however, part of a deal that seems to elevate companies above the usual consultative status that every other UN partner, such as NGOs, enjoy, onto an almost co-decisional arrangement. Some of my colleagues believe, and I tend to agree with them, that there will be advertising pay-offs for those companies who have joined, we call it the potential for blue wash.... Now this "all is well" approach, coupled with the above concerns may even mean that the Compact will cause a slow-down of the so necessary fast continuous improvement...the planet needs so much.

His enthusiasm for the Guidelines and suspicion of the Compact is a common position among activists. While the Compact enjoys some provisional civil society support, it is a less respected mechanism. Our argument, however, is that the Guidelines and Global Compact are, at best, two sides of the same coin. Both have the same goal—forestalling regulation—albeit with different audiences in mind. The OECD Guidelines are a more stringent and lower-profile mechanism meant for a very specific audience: the organized elements of civil society, such as NGOs and trade unions. The Guidelines' concessionary language around implementation has piqued the interest, attention, and hopes of civil society organizations. By contrast, the Global Compact, a largely vacuous but high-profile mechanism, is targeted at the larger public and mobilizes the UN's profile and legitimacy to quell widespread public concern with corporate power. To put this another way, the OECD Guidelines are a "thinking man's" Global Compact.

The International Chamber of Commerce has been a pivotal driver behind *both* documents. While the ICC agrees with van der Gaag that "the OECD Guidelines [are] the highest set of standards out there, and in the view of the ICC the most important code of conduct for business in the world," it also co-authored the Compact, or what is sometimes termed the "UN—ICC Global Compact" (quoted in van der Gaag 2001:4). It is unclear

why the ICC would suggest the Guidelines are superior to the Compact which it directly crafted. But the different purposes of the two codes are clear. Below, we unpack the Global Compact's strategic value for business.

### *The UN Global Compact*

According to the UN web site (2004),

The Global Compact is not a regulatory instrument—it does not “police,” enforce or measure the behavior or actions of companies. Rather, the Global Compact relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.

The Compact consists of nine principles, distilled from key environmental, labor, and human rights agreements, that the UN Secretary-General has asked business to follow. Corporate participation is voluntary; there is no screening process, nor is there monitoring or enforcement (Bruno and Karliner 2000:5). “On the surface, then, the Global Compact is a fairly modest initiative,” write Kenny Bruno and Joshua Karliner (2000:50), “yet it was inaugurated in July 2000 with great fanfare, with the CEOs of corporations such as Nike, Shell, Rio Tinto and Novartis sharing the stage with the Secretary General at UN headquarters in New York.” The Compact's meaning rests in the disconnect between its modest content and extravagant fanfare. Fully understanding the Compact, however, requires a brief historical digression about the political shifts that account for the Compact's profound differences compared to the 1976 UN Code on Transnational Corporations.

### *The ICC goes to Manhattan*

As we noted earlier, the original UN Code on Transnational Corporations, and the Center that was drafting it, were virtually terminated by 1992 at the behest of the United States, Japan, and the European Community. The downsized UN Center on Transnational Corporations (UNCTC) was then re-oriented towards “helping match up corporations and countries for foreign investments. This change had been an objective of the U.S. as well as some of the UN's most vocal critics, such as the Heritage Foundation” (Bruno and Karliner 2000:11). It was a logical extension of the much-trumpeted “end of history” (Fukuyama 1992). But as history was putatively screeching to a halt, so too was the earth's carrying capacity. It was in this light that the 1992 UN Conference on Environment and Development (UNCED; the Earth Summit) in Rio de Janeiro, came to be viewed by business as a threat to the forward march of neo-liberalism.

This fear was not unfounded. In preparing for the meeting, the then still-extant UNCTC was asked by the UN Economic and Social Council (ECOSOC) to prepare a set of recommendations addressing transnational corporations and other large enterprises that governments might use in drafting Agenda 21—the summit's major document (Bruno and Karliner 2002:25). The business lobby and Northern governments were, however,

determined to see these recommendations dropped. According to Peter Hansen (quoted in *ibid.*: 26), former director of the UNCTC,

The Recommendations were focused on Environment and Development.... The U.S. and Japan both opposed them, as they had opposed the Center on Transnationals. The U.S. and Japan had also made it quite clear that they were not going to tolerate any rules or norms on the behavior of the TNCs, and that any attempts to win such rules would have real political costs in other areas of the negotiations.

By the time the conference began, the UNCTC had been all but disbanded. “Try as the UNCTC staff might,” write Bruno and Karlner (2000:26) “they couldn’t get the Secretariat to accept their report, which might have laid the groundwork for a set of international standards on corporations and sustainable development.” Instead, at the behest of Maurice Strong, the Earth Summit’s Secretary-General, official recommendations were provided by the Business Council for Sustainable Development (now the World Business Council for Sustainable Development, or WBCSD). According to Karlner (1999:10),

The BCSO was made up of the CEOs of some of the world’s most powerful corporations. Together with the ICC, the BCSO made sure that most every reference to transnational corporations—some of the world’s most environmentally destructive entities—in the Earth Summit texts referred to self-regulation rather than any other mechanism to control their activities.

Bruno and Karlner (2002:30) elaborate on this point, writing that

The WBCSD and ICC, who despite some friction for the most part closely coordinated policies, proceeded to demonstrate what self-regulation meant: making Agenda 21’s chapter on business and industry compatible with their positions; lobbying, most often successfully, for the elimination of references to transnational corporations wherever possible throughout Agenda 21; and ensuring that the idea of even a minimal system of international regulations never gained public acceptance.

As has been the case historically and as part of its strategy to effectively forestall the regulatory solutions being sought, business had to at least address the concerns being raised by civil society. It was in this context that, in 1991, the ICC’s Business Charter for Sustainable Development was developed at the Second World Industry Conference on Environmental Management in Rotterdam, prior to the Earth Summit. At that meeting, “More than 1000 companies signed the nonbinding Charter, which urged that environmental management in a free market setting be recognized ‘as among the highest corporate priorities’” (Bruno and Karlner 2002:28). Borrowing a strategy from the past, business recognized that the best defense against the environmental movement’s arguments for more governmental control over corporate activities was a strong offense.



Thus, business and Northern governments entered the Rio conference with the Charter for Sustainable Development, and its promises that business would clean up its act, in hand.<sup>22</sup> Just before Rio, Stephen Schmidheiny, founder of WBCSD, pleaded with business that unless “we promote self-regulation...we face government regulation under pressure from the public” (quoted in Bruno and Karliner, 2000:29).

Thanks to a concerted effort on behalf of business and Northern governments, the resulting document was business-safe.<sup>23</sup> As the ICC’s Jan-Olaf Willums and Ulrich Goluke (1992:20–1) put it,

In general, the feeling among business participants was that the substantive output of UNCED was positive. It could have taken a negative stance on market forces and the role of business, and there was at one time the real possibility that the conference might be pushed to lay down detailed guidelines for the operations of transnational corporations. Instead it acknowledged the important role of business.... National governments have now begun to formulate their own policies and programs in accordance with commitments given in Brazil. We expect that these national laws and regulations will not be as stringent, bureaucratic and “anti-business” as some feared before UNCED.

Business successfully fended off the threat it perceived in the early 1990s and enjoyed relative calm until the latter half of the decade.

#### *Birth of the Compact*

In 1997, the Asian financial crisis shook confidence in the global market. Of equal concern was the collapse of talks on the MAI only months later. The latter signaled the emergence of a movement more international and broad-based than the burgeoning environmental movement of the early 1990s, one whose strength was on exhibit in Seattle in 1999. After the failure of the WTO ministerial in Seattle, the ICC announced that its primary strategic objective was now “restoring the momentum of trade liberalization” (CEO 2000c). Something had to be done to counter what ICC secretary-general Maria Livanos Cattai called “the growing globophobia and rising criticism of multinational business that poses a special challenge to the ICC” (quoted in CEO 2000c). A key plank in the business response to this new threat was continuation of its work from the early part of the decade, further securing the UN as an ally in the globalization debate. “Fearing an upcoming backlash against globalization that could threaten corporate-driven trade and investment liberalisation,” according to Corporate Europe Observatory (2000b), “the ICC’s charm offensive towards the UN is a very proactive move to ensure that any regulation of the global economy will be tailored to the interests of international business.”

In this light, the ICC can be seen as pursuing two goals. The first is to counter-intuitively *center* the UN as an authority in and venue for the globalization debates. As mentioned earlier, the ongoing concern is that civil society and developing countries will seek to inject the multilateral trade and investment regime with binding regulation. For the ICC (2000),

The multilateral trading system should not be called upon to deal with such non-trade issues as human rights, labour standards and environmental protection. To call on it to do so would expose the trading system to great strain and the risk of increased protectionism while failing to produce the required results. The right place for addressing these issues is the UN and its appropriate agencies.

But the right place must also be the “right” UN. The ICC’s second goal is, therefore, to continue *decentering* the UN as a venue for capitalism’s critics. And this plan has been working. In 1998, for example, the ICC hosted the Geneva business dialogues, “where high-level officials from the WTO, the UN, the EU and the World Bank, and other top decision-makers met with 450 global business leaders” (CEO 2000b). In his address to the attendees, UN Secretary-General Kofi Annan promised to “build on the close ties between the UN and the ICC” (quoted in CEO 2001:2). Only seven months earlier, at meetings with the ICC, Annan had agreed to “forge a close global partnership to secure greater business input into the world’s economic decisionmaking and boost the private sector in the least developed countries” (CEO 2000b).

UN complicity with the business agenda is not due solely to the ICC’s lobbying or strategic prowess; the UN has its own strategic interests in mind as well. First, by helping secure greater business input into the world’s decisionmaking, the UN is seeking to increase *its* input into “global policymaking, which, during the last years of intense economic globalisation, has been predominantly controlled by the Bretton Woods institutions (World Bank, International Monetary Fund and the WTO)” (CEO 2000b). Second, the UN is in financial difficulties for, “While the US continues to withhold 1.6billion (US) it owes, the UN appears to be hoping that the ICC may be an effective lobbyist [with countries] on its behalf (Karliner 1999:9). The ICC began fulfilling its end of the bargain at the 1998 and 1999 G-8 meetings, urging heads of state to provide more funding to the UN (Karliner 1999:9). It is important to note, however, that both Annan’s and the UN’s interest in the ICC is ideological as well as instrumental. While the UN is a far from homogeneous organization, the current UN Secretary-General is a proponent of neo-liberal globalization. His ideological alignment with the ICC is made clear in the remarkable speech he delivered to the 1999 World Economic Forum in Davos, cited at the beginning of this chapter, in which he first introduced the idea of a Global Compact between the UN and business. Annan’s speech articulates wonderfully the political terrain the various sides of the regulation debate find themselves on, and is worth considering in detail.

### *The Global Compact and the double movement*

After beginning with the typical “There is No Alternative” argument in favor of neo-liberal globalization—“Globalization is a fact of life” (Annan 1999:1)—the Secretary-General proceeded with his critique:

The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone guide the

course they take. History teaches us that such an imbalance between the economic, social and political realms can never be sustained for very long.

For Annan, the Western world's response to the Great Depression provided a model for how we might address globalization's externalities: "In order to restore social harmony and political stability, they adopted social safety nets and other measures, designed to limit economic volatility and compensate the victims of market failures" (ibid.). And, he continued (ibid.: 2),

Our challenge today is to devise a similar compact on the global scale, to underpin the new global economy.... Specifically, I call on you—individually through your firms, and collectively through your business associations—to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices.

What is astonishing about Annan's narrative is the way he moves seamlessly from a discussion of public regulation during the post-war years to a discussion of contemporary private regulation and "shared values." This move is even more remarkable, given that Karl Polanyi's (2001) theorizing is central to the Compact (Polanyi finds his way into the UN-ICC endeavor, we suspect, via John G. Ruggie who, at the time, was a UN Assistant Secretary-General.)<sup>24</sup>

Recall that, for Polanyi, *public* regulation is necessary for markets to survive. But Annan (and Ruggie) rationalize the emphasis on *private* regulation with reference to deepening globalization. For Ruggie, the public regulation Polanyi thought necessary is impossible to replicate on the global scale. "The reason is obvious," writes Ruggie, "there is no *government* at the global level to act on behalf of the common good, as there is at the national level. And international institutions are far too weak to fully compensate" (2003:4). But Ruggie's argument is somewhat disingenuous for, as Fred Block (2001:xxxvi) has written in his introduction to the latest edition of *The Great Transformation*,

At the global level Polanyi anticipated an international economic order with high levels of international trade and cooperation. He did not lay out a set of blueprints, but he was clear on the principles.... In other words collaboration among governments would produce a set of agreements to facilitate high levels of international trade, but societies would have multiple means to buffer themselves from the pressures of the global economy.... This vision also assumes a set of regulatory structures that would place limits on the play of market forces.

Ruggie is correct, of course, in arguing that the current political climate is not friendly to regulation. But this is an historical and political fact, not a necessary one. Moreover, as evidenced by the WTO, international institutions are *not* too weak to compensate for this "fact" (e.g. Alter 2003). That is why global labor has shown such interest in the WTO. Finally, it is not at all clear that business is willing or able regulate itself in the ways hoped for by Annan and Ruggie.<sup>25</sup>

John Ruggie is not a cynical man and genuinely believes that corporations can be socially responsible without public regulation. Interestingly, his and Annan's belief is rendered intelligible by Polanyi, who clearly argued that markets *require* a regulatory response to survive, for otherwise their very material bases for existence will be overrun. Annan trusts that business will come to see that its larger interests, its "enlightened self-interest," lies in effective (self) regulation. "Finally," says Annan (1999:2) "I choose these three areas [human rights, labor, and the environment] because they are the ones where I fear that, if we do not act, there may be a threat to the open global market, and especially to the multilateral trade regime."

An interesting difference arises, however, between Annan's understanding of this threat, and the ICC's. For Annan (1999:4), the threat is "protectionism; populism; nationalism; ethnic chauvinism; fanaticism; and terrorism"—"isms" that all "exploit the insecurity and misery of people who feel threatened or victimized by the global market." Unnamed, but lurking on the sidelines of the list, is the specter of economic nationalism (or even socialism), always threatening to become incarnate at the end of the end of history. While business undoubtedly shares Annan's fears, first on *its* list is the very "regulation" Annan celebrates in his account of past responses to economic strife. By contrast with the ICC, Annan is not absolutely opposed to regulation, a fact made evident in his speech. But even the mention of distant regulation, and the possibility of future legislation,<sup>26</sup> was enough to put business on the defensive about a document largely in line with their interests. On the very day the Compact was unveiled, for example, an editorial by ICC secretary-general Maria Livanos Cattai (2000), published in the *International Herald Tribune*, warned that

business would look askance at any suggestion involving external assessment of corporate performance, whether by special interest groups or by UN agencies. The Global Compact is a joint commitment to shared values, not a qualification to be met. It must not become a vehicle for governments to burden business with prescriptive regulations.

Not only does the ICC see the threat differently—*any* kind of legally binding regulation is anathema—but it simply does not accept Polanyi's argument. Unlike Annan and the Global Compact office, business assumes that "human" and "natural" limits are elastic—both have, so far, proven profitably pliable. But for Polanyi, as the limits to human and natural commodification are reached, reactionary counter-movements will *inevitably* arise to defend against market externalities. The closer we get to those limits, the more powerful and potentially disruptive the counter-movement will be. Indeed, with Polanyi's analysis in mind, Annan (1999:4) ended his speech with a final warning: "unless [the Compact's] values are really seen to be taking hold, I fear we may find it increasingly difficult to make a persuasive case for the open global market."

Ten months later, protesters against the WTO flooded the streets of Seattle. Annan appeared to be vindicated, and business took note. In early May 2000, more than 1,000 industrialists gathered at the 33rd World Congress of the International Chamber of Commerce in Budapest. In his opening speech, ICC president Adnan Kassar (CEO 2000a:3) warned participants that the main challenge for business today "takes the form of a highly vocal and well-organized array of special interest groups with their own

agendas.” According to Corporate Europe Observatory (2000a: 3), “fears about a backlash to the corporate agenda were a constant worry among participants. Almost every session, regardless of the issue on the agenda, turned into a discussion on how to counter the globalisation-critics.” There was general agreement among attendees at the conference that the Compact provided a golden opportunity for business to win the globalisation debate (CEO 2000a:4). But again, the ICC understands the Compact differently from the UN. Their different positions are registered in the different ways of reading Annan’s warning (1999:4; emphasis added) that, “unless those values are really *seen to be taking hold*, I fear we may find it increasingly difficult to make a persuasive case for the open global market.” Taking hold and “seen to be taking hold” are not the same thing. Annan has investment in the former, while the ICC appears to be happy with the latter.

We are not arguing that all of the ICC’s leadership or its members are completely cynical, but we suspect that, more than most, business has a keen appreciation that perception can be a reality unto itself. The Compact is a “golden opportunity,” less because it can better regulate and mold the behavior of business, and more because it can better regulate and mold the perceptions of those concerned with growing corporate power. Or, as Adnan Kassir notes (quoted in CEO 2001:3; emphasis added), “What the Global Compact does is to assemble a broad picture of company actions that *demonstrate* corporate citizenship in action in every part of the world.” “In the past,” Kassir continues, such initiatives “were often unnoticed, because they were conducted in isolation.” The ICC has the tendency to speak of the Compact less as a regulatory (even if self-regulatory) tool, and more as a mechanism that can advertise all the good corporations are doing in the world—good deeds that have previously been disconnected and unknown.<sup>27</sup> At the same Congress, plans were announced to enlist “the support of international media organizations to make the business response to the Global Compact even more widely known” (quoted in CEO 2001:3, 6).

Two months later, the Global Compact was officially launched amidst great fanfare. Corporations whose brands had been dragged through the mud were now hand in hand—on the covers of major world newspapers and television screens worldwide—with a widely recognized force for change in the world, the United Nations. As Kenny Bruno and Joshua Karliner (2002:54) note about the press conference, a synecdoche for the UN—ICC relationship, CEOs such as Nike’s Phil Knight were able to literally align themselves “with the UN flag, the symbol of international peace, and with the Nobel prize-winning Mr. Annan.”

According to the UNDP Guidelines and Procedures for Mobilization of Resources from the Private Sector, when a UN agency “is engaged in a public relations activity within the framework of a corporate relationship, a mutual image transfer inevitably takes place” (quoted in Bruno and Karliner 2000:7). This mass-mediated image transfer is exactly what business has gained from the Compact.<sup>28</sup> As noted, acquiring organized civil society’s support has not been a priority for business in its partnership with the UN; rather, business’s primary target has been the global public opinion that was turning against it. The Compact, simply put, is a sophisticated attempt by business to stem threatening anti-corporate criticisms without making significant changes to the business environment—changes required to address the externalities impelling the protests.

*Self-regulation and the truncheon*

The problem of human and natural limits to commodification, however, cannot be totally avoided by business. While such limits might always be contextually determined, they are still lived and felt by humans worldwide—humans with a stake in not only their (re)constitution but also that of their natural and social environs. Perhaps the increasingly militarized and disciplinary response to global justice demonstrations—as illustrated by events in Genoa, during which a demonstrator was killed—ought thus to be read as a harbinger of neo-liberalism’s coming contribution to the “counter-movement” described by Polanyi: the state intervention required to keep markets open and running. The OECD Guidelines and UN Global Compact are meant to stem deep frustrations with economic globalization without addressing their contradictory material roots. These codes operate at the level of perception, and have few effects beyond forestalling public regulation. But while they might stall resistance (the *telos* of which business reads as regulation), resistance, as Foucault reminds us (e.g. 1980), will still emerge. And, if business does not agree to a *public* regulatory solution to the “sweatshop problem,” it might find itself needing to push for regulation of another, more coercive kind. For now, in democratic countries, the disciplinary underside of voluntary mechanisms like the Global Compact is truncheons, rubber bullets, and tear gas.<sup>29</sup> The consent business cannot win through voluntary mechanisms will need to be secured with “public regulation” of an overtly violent kind.

Recall that, for Polanyi, the life of market societies depends on two forms of state intervention. First, speaking generally, state intervention is required for turning humans and nature into labor and land (i.e. commodification of labor and enclosure). Second, intervention is required to ensure markets do not ravage the very humans and nature upon which they depend. What makes the neo-liberal political project novel in the history of market societies is its ambition and ability so far (thanks largely to CSR) to stall the regulatory impulse integral to previously liberal societies. Neo-liberalism’s legacy, in Polanyi’s terms, is its capacity to jam the second half of the “double movement.” But this capacity comes at a cost. If human and natural limits are not actively minded, people will resist. Business must thus be prepared to support constant and active “redefinition” of humans and nature, and it must enlist the state in the perpetual pursuit of enclosure. In other words, as natural and human limits are surpassed, new humans and environments will need to be constituted and their limits redrawn (Luke 2003; Rowe 2003). Alternative visions will also need to be suppressed. The underside to self-regulation, whether business is prepared for this eventuality or not, is an increasingly regulatory state of the coercive kind. To put the point more pithily: The truncheon is the code of conduct’s *telos*.

**Is there no hope?**

Recently, there have been a few signs that codes of conduct, and CSR more generally, are losing their luster. Three developments in the debate over economic globalization may suggest a shift away from the self-regulation paradigm. Our basic argument in this chapter is that codes of conduct have been designed historically to forestall public regulation more than ensure responsible corporate behavior, an argument targeted in particular at civil society organizations that see voluntary codes as gateways to more

binding regulation. But the first development we would like to report is that this argument is already losing its critical bite! A civil society consensus is currently forming around the contention that the selfregulation paradigm has not fulfilled its promise. The clearest marker of this is a recent report published by Christian Aid, “Behind the Mask: The Real Face of Corporate Social Responsibility” (2004). This highly critical report has made media waves (Macalister 2004a; Frean 2004), and elicited harsh denunciations from the business community (Macalister 2004b). Write the report’s authors (2004:3), “We are advocating a move beyond corporate social responsibility to corporate social accountability—meaning that companies in the future will have a legal obligation to uphold international standards.” And, they continue (*ibid.*: 14),

NGO pressure can influence multinationals’ policy and practice in certain instances, [but] it is clear that it cannot, by itself, ensure that multinationals uphold environmental and human rights standards. In the long run, international NGOs may be more effective by throwing their collective weight behind the drive for international regulation than by tying up their scant resources in bilateral dialogues.

What made the “drive for international regulation” so powerful in the 1960s and 70s was an impressive coalition between the international trade union movement, Western social activists, and developing country governments. This social democratic coalition, broken during the 1980s, seems to be re-forming—and this is the second development worth highlighting. We cannot claim trade union resurgence, but today’s global justice movement appears much larger and stronger than its earlier incarnations. Perhaps of greater significance is the emergence of a new developing country oppositional bloc, called the G-20+. Its members include, among others, Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, and Venezuela. More than 51 percent of the world’s population and 63 percent of its farmers live in the G-20+ countries, producing more than a fifth of global agricultural output and more than a quarter of farm exports (Capdevilla 2003).

The G-20+ was introduced to the world in 2003, at the WTO’s fifth ministerial meeting in Cancun, where developing country governments organized themselves in response to longstanding concerns over agricultural subsidies and trade-related intellectual property rights. The group’s demands were not met and the talks collapsed. According to Thomas Palley (2003:1), an economist with the Open Society Institute, “The G-20+’s emergence represents a significant change in the landscape of multilateral trade negotiation. In the past, developing countries have been out-gunned by the superior negotiating capacities of the EU and US. Now, they have shown the ability to contest agendas they find unsatisfactory.” Still, while the G-20+ alliance holds promise for reform, it is a shaky one, with less influence and cohesion than the G-77. Some hope, however, that a coalition between global labor, the global justice movement, and the G-20+ might be able to achieve a “grand compromise” with business and Northern governments, one that includes international and enforceable labor and environmental standards coupled with guaranteed commitments of long-term development aid and debt relief for the developing world (Shoch 2000; Palley 2003).

Finally, a compelling set of corporate responsibility Norms is currently being compiled by the UN Sub-Commission on the Promotion and Protection of Human Rights (UN 2004). The legal status of these Norms remains murky, but their supporters see them as the first step towards a “grand compromise.” Business sees the Norms in similar terms and has mounted a coordinated opposition. According to Stefano Bertasi (CEO 2004) from the ICC,

We have a problem with the premise and the principle that the norms are based on. These norms clearly seek to move away from the realm of voluntary initiatives...and see them as conflicting with the approach taken by other parts of the UN that seek to promote voluntary guidelines.

The Norms overcame an impressive hurdle in April 2004, when the UN Commission on Human Rights, despite intense business pressure, opted to continue their development, a decision that was undoubtedly impacted by the wide-spread civil society support for the UN Sub-Commission’s work. In March 2004, nearly 200 civil society organizations endorsed a statement supporting the Norms (Amnesty International 2004). The UN Norms are attractive to civil society because they provide a positive alternative to the self-regulation paradigm *and* the UN’s general complicity with the ICC. The Norms are seen as a way to interrupt both of these trends, which have stalled attempts to regulate corporations in a sustained and enforceable manner. As put by Christian Aid (2004:50),

[We are] part of a growing network of NGOs, policy institutes, legal experts and development specialists arguing for an agreed set of legally binding obligations for business. There is an emerging consensus about the possible scope of such obligations, exemplified by the UN Sub-Commission on the Promotion and Protection of Human Rights’ development of a set of norms covering corporate responsibility. The time is ripe to move this consensus towards legal obligations.

The double movement continues.

What the chapters in Part II of this book have illustrated is the instrumental problems associated with self-regulatory projects. They are difficult to formulate, difficult to monitor and enforce, and they have few, if any, teeth. Some believe that transparency would make CSR more effective; others continue to believe that morality is key. But the problem is as much a structural one—if not more so—as it is one of depending on the good behavior of actors in the market. The distinction between “public” and “private” regulation, and the ultimate implementation of regulation in a meaningful way, has much more to do with social ethics than greater efficiency or profits. This point is the focus of Part III.

### Notes

- 1 CSR appears under a number of different rubrics, including “business social responsibility,” “social accountability,” and “business ethics.”



- 2 The ICFTU initially proposed the idea of a UN code on TNCs in 1969—international trade union support was central to the push for a binding code.
- 3 It should be noted that Robinson's *Multinationals and Political Control* is meant as a guide for "the business reader" (Robinson 1983: xv), and is not a critical work on global political economy.
- 4 The code, along with the UN Center on Transnational Corporations, was officially terminated in 1992. See p. 158.
- 5 For a particularly good account see Craig Murphy and Enrico Augelli's *America's Quest for Supremacy and the Third World* (1988). For Murphy and Augelli (1988:165), "The global recession engineered by the US made the Third World less-powerful in the world trading system than it had ever been before in the entire history of American supremacy within the world economy."
- 6 Indeed, the roots of the OECD Guidelines can be found in a voluntary code of conduct adopted by the ICC in 1972. In the introduction to the code, as reported by van der Fijf (1993:50), "it was stated that the aim was to 'create a climate of mutual confidence,' and that it was hoped 'these guidelines will be helpful to the United Nations' and other organizations in their efforts to 'promote constructive discussions of the problem'."
- 7 Is it not a bit ironic that the "problem" outlined by Powell was articulated in almost precisely the same terms by the Nixon Administration and the Pentagon with respect to the War in Vietnam?
- 8 This quote, interestingly enough, falls under the heading "Responsibility of Business Executives" in Powell's memo. For Powell, it is "socially responsible" for business to organize against assaults on the free enterprise system. This chapter accounts for how CSR has become part of the toolbox business uses to fulfill its responsibility to the system benefiting it.
- 9 Wendy Brown provides a nice definition of this term: "whenever the state was required to ostentatiously intervene on behalf of capital (whether through overt bail-outs and subsidies or slightly more covertly through policies that favored it), the state ran the risk of a 'legitimation crisis' as it tipped its hand in this way. That is, at such moments, the state revealed itself as a 'capitalist' state while its legitimacy depended upon perceived independence from social and economic powers" (Brown 2003:30).
- 10 For Robinson and Harris, traditional capitalist fractions are being replaced by a new one: national vs. transnational capital (2000:10). Given the intensity of globalized production, this fraction does not easily graft on to the former productive/money division.
- 11 It is telling that the phrase "The Washington Consensus"—often used interchangeably with neo-liberalism—was coined in 1989 by John Williamson, an analyst working for the Institute of International Economics (IIE),—a corporate-funded think-tank established in 1981. The phrase was used to summarize a list of policy reforms in Latin America that the IIE suggested the US pursue there. See <http://www.iie.com/staff/jwguide.htm#topic3> for Williamson's reaction to the popularity of his term.
- 12 It is important to recall that the "Battle of Seattle" was not fought solely in that city. According to George Katsiaficas (2002:29), there were major demonstrations in "14 US cities; twenty thousand people marched in Paris; eight thousand in Manila, three thousand in Seoul and thousands more around the world. In Mexico city a few days later, ninety-eight people were arrested and tortured for demanding the release of arrested Seattle demonstrators."
- 13 Apparently Enron's code of conduct has been a hot seller on E-bay (Vargas 2002).
- 14 One of the crucial controversies at the 1999 WTO ministerial meeting in Seattle was US President Clinton's desire—stoked by the mass protests outside the meetings—to begin negotiating a labor-standards protocol for the WTO (Hurd 2003:103). It is unclear how satisfied the global labor movement would have been with Clinton's proposal, but it held some promise for enforced standards. According to Hurd (*ibid.*), the proposal failed because

- of developing country objection—LDCs were concerned the standards were cover for either Western protectionism or neo-imperialism. For developing countries, high labor standards meant increased production costs, reduced foreign investment, and reduced competitiveness for their export goods. The failure of the US proposed protocol nicely signifies the impressive political economic shifts that have occurred since the mid-1970s. We would like, however, to problematize the tendency for commentators to suggest that developing countries are now proponents of economic globalization (Ruggie and Kell 1999 is exemplary). First of all, there is an ugly history to the support, or at least consent, Southern governments lend to neoliberal policies. Secondly, an increasing number of Southern governments (Brazil, Venezuela, Argentina...) are opposing the neo-liberal model. Indeed, the latest meeting of the WTO in Cancun saw the beginnings of a new Southern oppositional bloc—the Group of 20+ (see p. 166).
- 15 The OECD and UN, particularly the latter, are not homogeneous organizations. But for the most part, their institutional direction is now much more in line with business than civil society (see pp. 150–61).
  - 16 For William Carroll and Colin Carson (2003:45), “The ICC’s distinctive contribution to transnational class formation is to integrate capitalism’s centre with its margins; hence the ICC board blends a smattering of the global corporate elite with various representatives of national and local capital.” The ICC is as good a representative of “total capital” as exists.
  - 17 The ICC was heavily involved in these negotiations. According to Corporate Europe Observatory (CEO), the ICC wrote the effective blueprint for the first MAI draft (CEO 2000a). For an analysis of the MAI, see Sol Picciotto (1999).
  - 18 While broad in scope, the Guidelines are still weak on specifics. For instance, the human rights language in the text does not tackle high-profile concerns like indigenous peoples’ rights, or the corporate use of security forces to terrorize employees and stakeholding populations. Neither do the Guidelines, unlike most codes of conduct, include language on wages and benefits including a sustainable living wage (Gordon 2001:14).
  - 19 Infrastructurally, the NCPs “may be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be organized as a co-operative body, including representatives of other government agencies. Representatives of the business community, employee organisations and other interested parties may also be included” (OECD 2000).
  - 20 The Dutch case is the most promising *and* disturbing account of government acting on their “responsibilities towards civil society.” Aaronson and Reeves report: “In December 2000, the Dutch Parliament requested the government to link the OECD Guidelines to government subsidies for international trade and investment as well as export credits. The government simply asked all applicants for export subsidies to state that they were aware of and working to comply with the Guidelines. The Business Advisory Group to the OECD complained alleging that this action made the Guidelines ‘binding’.... Thus, the Dutch government’s effort to provide an incentive and to promote the Guidelines has led to international business opposition...the Dutch Government continues to persevere” (2002:16).
  - 21 Note, however, the lack of a complete consensus on the virtues of CSR within the business community. For many, admitting the virtue of business ethics is too significant a compromise (Henderson 2001).
  - 22 As with the case of the 1972 voluntary code forged by the ICC, it is likely the 1991 Business Charter was a benchmark used in formulating the revised OECD Guidelines, and especially the Global Compact.
  - 23 In one glaring example of government-corporate collusion, the Canadian government hosted a series of meetings to coordinate corporate lobbying of the Earth Summit negotiations (Bruno and Karlner 2002:30).
  - 24 Ruggie is currently Professor of International Affairs and Director of the Center for Business and Government at Harvard University, but from 1997 to 2001 he was Assistant Secretary-

- General and Annan's chief advisor for strategic planning. His most oft-cited work on Polanyi is "International Regimes, Transactions and Change: Embedded Liberalism in the Post-war Economic Order" (Ruggie 1982), updated in subsequent articles (Ruggie 1991, 1995, 2003). It is quite likely that Ruggie wrote most or all of Annan's speech.
- 25 The simple question rarely addressed in the CSR literature is that, if business is truly serious about social responsibility, why is it so vehemently opposed to such responsibilities being formalized in law?
- 26 "Don't wait for every country to introduce laws protecting freedom of association and the right to collective bargaining" (Annan 1999:3).
- 27 For Corporate Europe Observatory: "The ICC's approach of presenting isolated, non-verifiable initiatives, however insignificant and unrepresentative of the companies' record, as proof of 'corporate citizenship,' is deeply flawed. For instance, the fact that automobile and arms producer Daimler Chrysler uses locally produced coconut fibers in a Brazilian factory producing car components says nothing about the company's overall environmental conduct" (2001:3).
- 28 The Internet is the primary mechanism used to publicize the Compact. It is of note that the ICC eagerly launched its own official web site three months before the official Global Compact one was released (CEO 2000b).
- 29 Eddie Yuen nicely captures the currently uneven, but increasingly generalized police response to global justice protestors: "As Genoa, Geneva, and Gothenburg in Europe and the Port of Oakland, Sacramento and St. Louis [and Miami] in the US have shown, Northern white activists are increasingly being treated like their counterparts in Argentina, the Philippines, or Harlem. Capitalist globalization is now characterized by a race to the bottom for basic freedoms and civil liberties as well as for environmental and working conditions" (2004:xiii).

# **Part III**

## **ЧТО ДЕЛАТ?**

What is to be done?



## **Morals, markets and members: privatizing human rights in the name of the public good**

[A] change in personal behavior stands a good chance of effecting change in consumer behavior. When people change the way they act, and then personally benefit from those actions, they are likely to have a strong positive association with the company that spurred the change.... The company could derive tangible marketing benefits from the change in consumer behavior, assuming the company has chosen a cause that fits its core markets, goods, and services.

Kotler and Lee (2004:16)

### **Introduction**

At the beginning of the twenty-first century, virtually no aspect of democratic politics seems to have gone unmarked by the penetration of market logic, and it is increasingly problematic to even speak of “democracy,” as politics have become embedded, more and more, in markets. Indeed, even relatively weak conceptions of politics have been marginalized, as evident in high levels of public disillusionment with institutionalized political practices (Norris 2002; Patterson 2002). In their place, we find an increasingly widespread and popular fascination with politics mediated through market-based mechanisms or, in my terminology, “politics via markets.” In place of a role in decisionmaking, voters are offered methods designed with an eye toward “efficient” outcomes, in the belief that this will generate the greatest good for the greatest number. Any deontological concerns about means or justice are mostly ignored in pursuit of utilitarian ends. We can do good by doing well, in other words.

No one is driven solely by self-interest, of course, but even those seriously concerned about fairness, justice, and rights seem to prefer acting through markets in order to instantiate both global and national social regulation. Why? In Chapters 2 and 3, I argued that this was a relatively, although not wholly, new phenomenon, brought about by neo-liberal globalization and, more specifically, by changes in global production patterns and social organization, on the one hand, and the failure of global “economic constitutionalism” (Jayasuriya 2001) to take into account the social externalities generated by globalization, on the other.<sup>1</sup> In this context, as we have seen in Chapters 4 through 6, the market appears to offer a myriad of possibilities for private regulation within commodity chains, without interference by the liberal state. To be sure, a great

deal of regulation continues to be articulated through states and international regimes (Vogel 1996), among them the United States' Super 301 Clause and the TRIPS component of the World Trade Organization (Drahos 2003), but these rules address, for the most part, the structure of the global political economy under which capitalists and capital can expand, accumulate, and prosper (Cerny 2000). By contrast, most of the social concerns raised in the earlier chapters of this book, being addressed via market mechanisms, have to do with various "human" rights, whether individual (such as working conditions, labor rights, etc.) or social (public health, environmental sustainability, women's rights, etc.).<sup>2</sup> What we have seen, especially in Chapters 4 and 5, is that such market-based regulation falls short—at times, far short—of offering adequate, much less complete, coverage in terms of these rights, even as these rights are, in essence, privatized.

The reason for this gap, as we shall see, arises out of the particular and peculiar relationship between "public" and "private," alluded to in Chapter 3, which we find in social systems organized around political and economic liberalism. As a rule, political theorists of liberalism regard the public sphere as the realm of politics and public goods, but see it as one that ought to be constrained in the interests of markets and civil society (Muller 2002: ch. 13). While there is disagreement over how and where its boundaries should be drawn, the private sphere is normally identified as that arena in which market transactions take place between individuals and in which, depending on the theorist, the household (or family) and civil associations dominate (e.g. Ferguson 1767; Rosenberg 1994: ch. 5). Rights within liberalism, understood in expansive terms, accrue to individuals, and not groups or the polity as a whole, and ought therefore to be operational within the private sphere, as well (Macpherson 1962; Shapiro 1986). In general, rights are seen as protecting the individual against the overweening power of the state, and it is the state that, in its public capacity, is expected to ensure these rights through self-restraint, as a form of public goods provided to private individuals. By contrast, markets lack the *structural* authority or capacity to make the provision and protection of rights a binding obligation on other private parties. This is the contradiction, I would argue, that lies at the heart of the inadequacy of trying to protect rights through market mechanisms.

Access to rights is often articulated through the principles and practices of citizenship. That is, although human rights are often claimed to be transcendental (or "natural; see p. 176), as seen in the classics of the literature, the founding documents of the United States, the declarations of the French Revolution, and various UN conventions, rights are available to individuals only through the medium of the states in which they are citizens. Even so, the full range of rights is not always granted or even recognized. Under contemporary conditions of capital and labor mobility, moreover, growing numbers of individuals reside and work both legally and illegally in countries where they are not citizens. These migrants are, consequently, legally denied the full panoply of "universal rights." This lacuna poses problems in terms of not only political participation but also access to the market and forms of exchange therein. If human rights are thought of as forms of "property in the self," conceptually parallel to title to one's labor (Macpherson 1962)—an argument discussed later in this chapter—it becomes clear that the commodification and alienation of rights *in* the market—what Macpherson calls "relations of exchange between proprietors" (1962:3)—cannot occur simultaneously with

their protection *by* the market. Thus, any putative guarantee of rights through the mechanisms of the market is oxymoronic, at best, and a fraud, at worst.

As I shall suggest in this chapter and the next, the social regulations necessary to ensure such rights in the self can only be made effective through what might be called “sovereign” action. This must happen through *constitutive* rather than *distributive* politics, a political move that instantiates particular social ethics integral to the state’s structuring of political economy. This cannot take place within neoliberal states as they are presently constituted, although it must happen through the state. But such a political exercise threatens to open a Pandora’s box of social struggles because it will undermine the hegemony of specific social forces within particular societies. If established forms of rule are challenged by social movements, not in terms of distributive outcomes but, rather, in terms of the constitutive politics and legitimacy of those who rule, social hierarchies will be challenged and upset. In crude terms, this would be akin to the “mob rule” decried by Callicles in his dialogue with Socrates (Plato 380 BC/1998) and described by Bruno Latour (1999:10–17, ch. 7) as the worst fear of those who seek the safe ground of transcendent authority. Insofar as one goal of contemporary government is the utilitarian welfare of populations with an eye toward social stabilization,<sup>3</sup> a constitutive politics threatens that stability and the interests behind it. To push the point farther, violence is immanent in the market (Galtung 1995: ch. 2), in terms of the injustices it perpetrates as well as in the threat of punishment (by the state) for those who disturb its order (seen, for example, in police responses to anti-globalization demonstrations). This brings us back to Foucault’s (1991) concept of governmentality in its neo-liberal form, in which management and pacification are pre-eminent goals, while sovereignty is suppressed as a potential threat to order.

I begin this chapter with a review of the general problematic of market-based regulation, to wit, that it not only is of limited effectiveness, but also cannot include all who are entitled to coverage, whether or not they are citizens of a particular state. Indeed, efforts to generate market-based social regulations fall prey to the fallacy that choices made on the basis of individual preferences can aggregate to structural changes in the norms, ethics, and rules—the political economy—that shape and govern transactions in the private sphere (Boyer and Drache 1996). What is clear, in both theoretical and practical terms, is that social activism or corporate social responsibility cannot do more than affect behavioral trajectories *within* institutions, that is, to alter the *individual* behaviors of consumers and corporations, and only so long as it is in the individual self-interest of consumers and corporations. As a result, the protection of rights becomes as evanescent as the resale value of a cutting-edge computer system.

In the second section, I examine the problematic relationship between the “public” and the “private” that is characteristic of liberal political economies and which gives rise to the contradictions we find in the concept, application, and exercise of “human rights.” Human rights are normally thought of as mandatory but, in fact, they are optional. They should be contrasted with *social ethics* which, in effect, mandate specified behaviors by *every* member of political society. This point is also explored in this section. Human rights have, classically, been authorized by reference to so-called natural rights (e.g. Vincent 1986: ch. 2); in that sense, they are considered to be transcendent and fully binding, even if this is a questionable proposition, especially considering their routine violations. But the very idea of such individualized and universalized rights is



inconceivable outside of a capitalist framework that reifies the sovereign, market-centered individual (Macpherson 1962). Indeed, I argue here that the entire human rights discourse of the last 50 years cannot be detached from that framework as it has more recently come to be articulated through neo-liberalism, and this has serious implications for the displacement of politics and the ultimate effectiveness of privatized regulation. In this section, I draw on the arguments of Ellen Meiksins Wood (1995: ch 1; 2002) and others (Rosenberg 1994), who point out that the public-private distinction is foundational to capitalism and the modern state as well as a necessary condition for capital accumulation and market expansion. Because there is no logical limit to that which can be turned into “fictitious commodities” by capitalism—blood, body parts, genes, knowledge, individual preferences, among other such things (Drahos 2003)—the state stands as the only hedge against capital’s transformation of the world into Polanyi’s “stark utopia” with its annihilation of “the human and natural substance of society” (2001:3). The “boundary” between public and private is thus the site of intense struggle and contestation, between classes, between social movements and corporations, between elites and peoples. And this is particularly the case if and when the state endorses the further encroachment of the market into the public commons (Anton 2000).

In the final part of the chapter, I apply my analysis of the division between public and private to explore the extent to which human rights can be understood as rights to property in the self, as a mechanism generated and extended historically to grant to individuals political authority over their own bodies. These rights are then guaranteed by the state as a public good available to all members of society but are, nonetheless, subject to constant and relentless assault by market forces which can only appropriate from that which can be alienated. It is at this locus of assault and resistance that class struggle and related identity struggles are at their most intense, and where essentially bourgeois rights are deployed to moderate the wholesale commodification of everything and everyone. To put this point another way, a corporation’s provision of the fundamental rights of workers is not a costless proposition. Capital’s capacity to commodify labor at a low equilibrium price so as to realize greater profits is challenged by labor’s right to bargain collectively for higher wages and proper working conditions. Where labor is deprived of this, and other protective rights, capital is able to appropriate ever-larger shares of a worker’s property in the self, further privatizing and transforming a public good (or commons) into private benefits. This last argument then sets the stage for the focus of Chapter 8: What are we to do?

### **The limits to privatized social regulation**

Globalization generates social and material externalities.<sup>4</sup> As an extension and deepening of “free-market” capitalism, the processes associated with globalization are subject to a broad range of rules and regulations, both national and international (Braithwaite and Drahos 2000; Drahos 2003). These rules and regulations have, however, tended more in the direction of specifying the frameworks within which capitalism can expand into and through new commodity frontiers (“enclosure”), and have failed to address (or “embed”) the externalities generated by such expansion. In the process of expanding and deepening, moreover, capital is given license to appropriate things, knowledge, and practices that

had theretofore been considered public commons and public goods (Anton *et al.* 2000; Drahos 2003). There is nothing new about this phenomenon, of course; it is inherent to the system. The 500-year history of capitalism and colonialism is, moreover, replete with examples of enclosure, as a result of which goods and resources formerly available to popular or communal use were seized and signed over by state authorities to private parties (Guha 2000; Polanyi 2001). The key difference is that, in the past, clearly visible agents—Parliament, sovereigns, presidents, bureaucracies, landlords, businesses—could be held accountable for laws enabling enclosure. Under contemporary neo-liberal conditions, however, while the agents are still there, they are much less visible, behind the curtain, as it were, and the legal authority permitting enclosure seems to emanate from rules and regulations instantiated in far-away institutions. When challenged on the propriety of such enclosures and subsequent commodification, these agents fall back on the old saw that “the market makes me do it!” Competition absent alienation is also not possible.

Under conditions of international politics, as is well known, there is no final global guarantor (Lipschutz 2002) of either property rights or human rights, notwithstanding various interstate conventions, treaties, and agreements addressing patents, trademarks, and copyrights as well as human rights. Such guarantees as there are remain the prerogative of individual states, and provision of both human *and* property rights relies on governments’ willingness to implement those rights within national borders (but see Thomas 2001). There exist a few authoritative international arrangements to monitor, enforce, and sanction violations of certain forms of property rights, such as are found in the Dispute Resolution Panels of the World Trade Organization (Alter 2003). Where other rights are concerned, such mechanisms are weak or non-existent (Braithwaite and Drahos 2000; Drahos 2003). Attempts to incorporate such rights into the World Trade Organization have, so far, met with considerable opposition, as an infringement on the sovereignty and cultural heritage of individual states (Bhagwati 2002; but see also DeSombre and Barkin 2002).

One response to this lacuna, as seen in Chapters 4 through 6, is the growing number of activist campaigns and corporate codes devised to supply human rights through the market, within particular commodity production chains and, in a few cases, across resource sectors. As illustrated in those chapters (and suggested by the quotation at the beginning of this chapter), such projects have been subject to a particular form of logic: that behavioral changes on the part of *individual* corporations and consumers can and will have *structural* consequences in those societies where rights violations are taking place (e.g. Kotler and Lee 2004). That is, the aggregation of individual behavioral changes will result in the instantiation of a social ethic binding on society *without any involvement by the state*. The consequence of this logic as applied has been uneven and of only limited success; its philosophical and political implications suggest that the logic is deeply flawed. This claim grows primarily out of the observation that the anticipated behavioral change is not obligatory and is indicative merely of individual morality. Defection is not only possible, but it is almost mandatory. I shall return to this point in Chapter 8.

Given such flaws, what have been the *constitutive* ethical and political effects of the campaigns, codes of conduct, and corporate responses described in this book? How have they altered the political economies within which capitalism operates in *structural* terms? Are workers in the Nike commodity chain now not only free to unionize and bargain

collectively but also supported by state and society in efforts to expand these rights and practices? Can corporate activity *within* commodity chains effectively change regulation and rights *outside* of factory walls? Are forest owners and managers engaged in sustainable forestry as a matter of social obligation and legal requirement rather than merely out of business interest? To what extent has fulfillment of human rights become *binding* on specific societies as a whole? The empirical part of this book, Chapters 4 through 6, suggests that the answer to all of these questions is “no.” While one can point to improvements in individual factories (O’Rourke 2004) and corporate commodity chains (van Tulder and Kolk 2001; Taylor and Scharlin 2004), it is also the case that the market-oriented strategy is, broadly speaking, ineffective and seriously misleading of those who believe in its efficacy. Amidst all of these initiatives, very little attention is being paid to the structures of rules and regulation that states have put in place to attract capital and reduce social costs, both of which lead to the demand and need for social regulation in the first place.

Thus, for example, Nike offers improved working conditions and higher wages to the employees in its subcontractors’ factories, but workers as well as consumers remain fully integrated into the regime of commodity production and consumption that, in corporate eyes, objectifies them as “productivity factors” and “profit centers” (Dawson 2003; see also García 2001). Consumers remain subject to the offerings of the market while workers remain unable to influence or change constitutional arrangements either on the factory floor or in society at large. To put this another way, in host societies there has been little in the way of political change, of stronger state regulation, or more widespread opportunity for labor to exercise those rights granted to it by virtue of international and domestic law, whether natural or not. This failure has ramifications for home societies, too. Consumers remain dependent on capital for the opportunity to purchase “socially responsible” goods. Capital continues to exercise its institutional power within the market as well as to influence the shape of the political economy through implicit threats and explicit campaign contributions. At the end of the day, there is little in the way of structural transformation or social change. Structures receive a paint job, so to speak, but underneath they remain the same structures.

A specific illustration of this problematic can be seen in an agreement between Wal-Mart and the State of California in 2003, involving the sale of guns to customers by the former. This case addresses the public’s “right to bear arms” as well as the efficacy of private enforcement of public law. The so-called Brady Bill, a US federal law, mandates background checks and waiting periods for individuals who wish to purchase handguns. These checks are intended to certify that the purchaser is not a convicted felon, while the waiting period is calculated to encourage an emotional “cooling-off” prior to acquisition of the weapon. California has similar legislation.

Despite some consumer opposition, Wal-Mart sells guns to the general public. In 2002, the chain announced a new set of national rules on gun sales: “Store managers were instructed to stop selling guns to people left in limbo by unfinished or delayed background checks, a policy stricter than current federal law” (Salladay 2003). An investigation by the office of the California Attorney General found, however, that six stores around the state had violated state laws 490 times, as a result of unavailable equipment and, it would appear, willful actions by uninformed or indifferent employees (i.e. the “principal-agent” problem). Confronted with this evidence, the company agreed

to halt gun sales in its 118 California stores until it could put in place a “new training program for its California workers to comply with the law” and negotiate a new agreement with the state (Salladay 2003). Thus, even though Wal-Mart had a stated private “code of conduct” regarding the sale of firearms, implementation was, in effect, left up to individual employees whose specific interest and job was (and is) to sell guns. It does not appear that the state will prosecute either the corporation or those individuals who violated the law and, so long as the policy relies on self-regulated behavior, we may expect that the new Wal-Mart policy will be little more effective than the old one.

It is not difficult to see why such commitments to socially responsible behavior remain weak: the state has limited resources for monitoring violations of those “rights” offered by codes of conduct—it has only limited resources for preventing violations of those rights it provides—and almost no legal basis for punishing private parties who violate their own codes. At the same time, not only is there nothing but peer pressure to bind private parties and their employees to such pledges, but there is also nothing to motivate other retailers to engage in similar behavior, either (but see Fung *et al.* 2001; Milani 2000). To extend this argument, if, for example, structural conditions in a particular country are generally unfavorable to unions, collective bargaining, and other workers’ rights—and this is the case even where countries have ratified relevant ILO conventions—their provision in individual plants is not likely to have much impact on labor conditions across the country as a whole. Even if workers receive high wages in one owner’s plants as a result of deliberate corporate policy and as mandated by a code of conduct, there is no concrete incentive for other plant owners to follow suit (indeed, they would be foolish to pay more than the clearing wage if they can). And if a consumer finds she cannot afford the cost of certified wood to build a house, a broken vow to use only sustainably harvested timber carries no legal penalty or moral opprobrium. The appeal to enlightened self-interest extends only so far as an activity is profitable or beneficial, and one would be thought a fool to continue any such action once costs begin to mount. Without a means to bind all parties equally to a commitment, defection of even the virtuous liberal individual seems likely, sooner or later. This is, of course, simply another version of the state of nature and the tragedy of the commons: if we do not all agree to coercion, we will all assuredly suffer for our failure to do so.

As many observers have pointed out, the “tragedy of the commons” (Hardin 1968), aka the “collective action problem” (Olson 1965), is largely an artifact of liberalism and the ontology of possessive individualism rather than a consequence of limits to land and population growth (Lipschutz 2003:114–15). Where self-interest and private property are held up as society’s highest values (even if those values are not binding), these must, it would seem, be at odds with public interests and survival of the commons. But privatization through the market only exacerbates the so-called tragedy, for it turns social beings into sovereign atoms, intent on protecting only that which they own. The answer must lie, therefore, not in privatization but toward some kind of public or “common-pool” arrangement (Bromley 1992; Dolšák and Ostrom 2003). That is, social regulation and the general relationship between politics and economics, between public and private, are not simply matters that can (or ought to) be left to markets and their agents. Regulation of any sort inevitably involves costs imposed on both business and polity, but how such regulations are imposed, and by whom, makes a difference. The arguments and justifications for regulation—and to whom they are made and why—must come about

through the political, which must take place not within or through the market but in the *public* sphere. It is the *ethical* basis of the state's exercise of its power—especially the structural power to frame and constrain the market—that must be changed, not simply the moral behaviors of individual consumers and corporations, as I shall argue in Chapter 8.

If we understand “regulation” to include limits on certain kinds of activities and actions which the political community finds undesirable or wishes to restrict—murder, domestic violence, human rights violations, pollution, unsustainable forestry—it also becomes clear that membership in that community must include the obligation to participate in collective decisionmaking regarding these shared ethics. Such ethics are likely to impose restrictions on market activities or uses of property, whether intentionally or not, and they will, in all likelihood, become the focus of intense opposition and struggle by capital. Nonetheless, *it is the prerogative and duty of the political community to consider such limits, demand them, and see that they are implemented in a binding fashion*. Because neo-liberal globalization has resulted in expansion of the economic sphere beyond the political one (e.g. Hardt and Negri 2000), domestic *political* regulations reflecting ethical principles can be overturned by international *economic* institutions, as seen in the dispute resolution mechanisms of the WTO (Alter 2003). Unless, however, the people of individual countries have assented specifically to this regulatory hierarchy and accepted the social and environmental externalities that go with it—and there is good reason to think that very few have consciously and deliberately done so—people have the obligation to resist.

To put this another way, under extant regimes of neo-liberal governmentality, the political economy has been structured in such a way that agents, laws, and practices of the state are able to discipline and punish populations (including corporations) and to ensure that matters which might challenge or undermine this structure are kept off the institutional agendas of distributive politics (see Chapter 8). Social activists attempt to bring such matters to public attention in order to generate the pressure necessary to get them considered in political institutions (such as legislatures), where they can be debated and, perhaps, incorporated into the normal parameters and practices of governmentality. These activists deploy forms of expertise—science, economics, the language of rights—in the effort to illuminate the “true” interests of producers and consumers. They do so by illustrating how present conditions affect those instrumental interests (e.g. “pollution is killing you”; see Wapner 1996) and through shaming of those who are violating such interests (e.g. “corporation X does not care about its customers”; see Keck and Sikkink 1998). The hope is that public demands will induce producers to act in a more “socially responsible” fashion without all the muss and fuss of statebased politics. Yet, all the time, these activities are taking place within a structural framework of politics and economics that, ultimately, organizes and maintains neo-liberal governmentality's agencies, institutions, and practices, especially those of the market. Power exercised in and through the market is diffuse and invisible, scattered among myriad centers and agents—“capital” is a rhetorical construct; it has no “there”—and there is little possibility of changing the overall structure of the political economy by changing the agents of capital one at a time. Governmentality remains largely undisturbed by politics through markets.

The discussion of the OECD Guidelines and the UN Global Compact in Chapter 6 nicely illustrates this argument. As the recent history of CSR and the code of conduct makes clear, these are responses by both state- and market-based agents to defuse and

diffuse public concern about externalities and the appropriation of the commons. But, both codes are very careful not to propose internationally binding rules as a means of controlling the excesses of capital. Instead, both institutions and the political economy within which they operate are left intact, while these selfsame agents are offered the option of limiting their individual appetites. There are, of course, some economic costs to self-regulation, but no agent in the market will hew to its code if profits disappear or bankruptcy looms. There are limits to just how far these codes can, and will, go. Where they will not go is toward the restoration of “rights” that have been appropriated from the public commons and turned into privatized fictitious commodities.

### **Across the great divide redux**

Let me be clear here about my use of the terms “public” and “private,” as they are proxies for a specific ontological feature of contemporary liberal society. More generally, a right to use a thing (or another’s labor) exists as a result of the social relations constituting a group. Indeed, property is not a *thing* at all; it is constituted through specific social relations by which the group recognizes and authorizes what things are to be used in common by the group and what can be used alone by the individual. Within most historical contexts, property could be transferred to individuals, or between individuals, but only with recognition by and approval of the group. For the most part, property could not be alienated from the group and, therefore, it could never come into the sole possession of any individual or agent and sold in the market. “Private” did not exist.

Consequently, in historical terms, “private property” as a possession of self-conscious individuals must have emerged in parallel with social struggles between monarch and aristocracy over entitlements to goods and commodities. Under the rule of the Church Universal, these entitlements were transcendent in origin and vetted by the religious authorities. The Protestant Reformation and its century of wars destroyed not only the Great Chain of Being but also the legitimacy of the entitlements it conferred. In the further struggles that followed—over absolutism, over nationalism, over individualism—the winning coalitions were largely premised on a division of property between state, market, and individual. The final division of property was not settled until the collapse of the Soviet experiment and the “end of history” that followed. It has, as I have argued above and elsewhere (Lipschutz 2000), culminated in the individual sovereign, proprietor of her own human and social capital, owner of property in the self. But what ensures that such property will not be simply appropriated away by other individual proprietors (among whom we must include not only states but also corporations)?

Liberalism, however, rests on the partly fictional assumption that the individual exists *prior* to the social group, and it is certainly the case that each of us is most aware of the self as a self-referential mind and body distinct from others (Elias 1991; Abercrombie, Hill and Turner 1986: ch. 2). There is good reason to believe that this has not always been the case and that, prior to the emergence of “possessive individualism” (Macpherson 1962), people thought of themselves as parts of a social whole. That is less important than the implication, so nicely described by Hobbes, arising from the priority of the individual, to wit, that private property cannot exist outside of the group, which is the reason he offers for selection of a sovereign. This approach to property and

possession must be compared to Locke's conception of how private property came into existence (Macpherson 1962: ch. 5). According to Locke's reasoning, that which is waste—that is, that which is not being used in a visible fashion that results in "improvement"—can be possessed and transformed by the individual's labor. That which is already private property and has been transferred through title or inheritance was, presumably, unimproved waste at some time in the past (a highly debatable point). Locke's private property, unlike Hobbes's, exists in the state of nature. It *precedes* the state, which simply assumes the individual's legitimate possession and inscribes it in the appropriate texts and records. As Sheldon Wolin (1960:310) has pointed out, however,

Locke's assertion that property preceded government made sense only if he simultaneously assumed the existence of society. What allows the act of appropriation to issue in "private" possession is that others will recognize the validity of the act. In other words, appropriation is individual in character, but the recognition which converts it into an effective right is social. In this sense, property can be said to be a social institution identified with society rather than with the political order.

Nevertheless, Locke's argument is the same one that underlies contemporary policy and practice with respect to the creation of private property, such as intellectual property rights: it is the "labor" introduced into the "raw material" that transforms the latter into private property.<sup>5</sup>

The implication of Wolin's observation is significant. Under capitalism, the authorized and inscribed recognition of use, codified in property rights and title, is of central importance, for only that to which individuals hold recognized title can be alienated in the market. Because exchange takes place at arm's length, often between individuals who may not be members of a well-defined social group (Fukuyama 1995), there is only written title, guaranteed by the state, to ensure that the buyer of a good is acquiring it free and clear, without encumbrances or obligations. It is the rare item that comes without any such constraints. Some "rights" are contractual, such as rights-of-way across land, while others are regulatory, such as limits on what the owner of a car or gun may do with it. What is "private," then, involves those relations among individuals within a society that are authorized as legitimate by that society (in this respect, in other words, there is no such thing as the individual). Note, moreover, that, according to this line of argument, there is no such thing as "private property" either, inasmuch as such property is constituted through social relations and constructed through appropriation from a shared commons (Hegel 1821; Avineri 1972).

By contrast, the "public" is that which is constitutive and reproductive of the social group (i.e. society) and its practices,<sup>6</sup> and this includes culture, ritual, and politics. Although these three practices can be performed or meditated on in private, they nonetheless mark individuals as belonging to specified groups, be they religions, nations, clans, genders, or classes.<sup>7</sup> What is public cannot be privatized or alienated *unless there is group agreement*; to do otherwise is called "corruption" or "embezzlement." In modern terms, the state is an agent for this group—which is often called "The Public" or "the people" (or "the nation")—and in that capacity is regarded as the guardian and guarantor of what is and must remain public, whether that be property or principle.

Regulation is, therefore, a key link here. As I shall develop this argument in the next chapter, regulation can be understood either as a form of restriction on individual *morality* or, as argued above, as an *ethical* constraint accepted by a community in the pursuit of a common end.<sup>8</sup> Principles encoded in the beliefs and practices of The Public take the form of social ethics which convey a sense of what constitutes “proper” behavior within and proper ends for that social group. Although the relationship between ethics and laws is a complicated one, the former often, although not always, gives rise to the latter. Notionally, at least, an ethic is obligatory and binding on society and its members, and the state is the mechanism and agent through which it is articulated. Ethics are, consequently, not immutable: they can be reinterpreted, changed, or even replaced, but only as a result of political contestation within the group. In liberal society, morality, by contrast, resides with the individual. It is derived from sources that are often transcendent and external to society—although such sources are not necessarily external to groups *within* a society—and, as such, cannot be an object of political struggle or subject to change. It is up to the individual to decide whether to act according to such morality or to violate it. For the most part, the only penalty for moral violations is damnation (although excommunication is always possible).

Human rights—understood here in a broad sense to include not only traditional political, social, and economic rights, but also labor rights, children’s rights, environmental rights, rights of access to common property resources, etc.—represent a particular type of public good offered through the offices of the state (Anton *et al.* 2000). Although rights are generally seen in terms of freedoms and privileges, they also act as constraints on the arbitrary actions of states and, by extension, market- and civil society-based actors. In effect, human rights prohibit the imposition of certain kinds of “externalities” onto individuals—violence, hunger, poverty, pollution—by states, corporations, and other individuals. In this respect, then, regulation also defines the boundaries of citizenship, whose attributes can be seen as barriers not only to depredations by state authorities but also to appropriation by capital.

The distinction between public and private is often articulated in terms of the market being a realm of “freedom and choice” and political society a realm of “coercion” (e.g. Hayek 1944), inasmuch as its members must obey society’s ethical strictures. Yet, the market is also instrumental to neo-liberal governmentality and its mechanisms of discipline (in some instances, approaching totalitarianism; see Marcuse 1964; McMurtry 2002; Dawson 2003). In politics, by contrast, it is the sovereign *demos* that freely agrees to self-coercion (albeit not in the somewhat arbitrary manner in which Hobbes’s sovereign is selected by men in assembly). In this respect, therefore, regulation can be understood as a decision by the polity to establish specific boundaries between the public and private spheres, and to limit the encroachment of private actors into the public realm. Somewhat paradoxically, then, human rights, which are normally understood as setting limits to the state’s power over its citizens, can also be understood as assertions of *individual rights of property in the self*, along the lines of the individual’s right to sell his or her labor in a free market (Stanley 1998). In other words, the individual proprietor is possible only if a person is given a grant of political authority over the self, which then turns that grant into private property (Wood 1995). Regulation thus appears not only as a direct restriction on the activities of both state and capital but also as limits on capital’s intrusion into the public realm, here taking on the form of restrictions on appropriation of



“rights” to the self. Citizenship thus confers a bundle of such rights on to the qualified individual but denies it to others, whose property in the self may be threatened by the market.

### **Human rights and economic citizenship**

The conventional story tells us that citizenship and human rights are political entitlements, having emerged through an historical and somewhat teleological process of political development and bourgeois struggle with the absolutist state, culminating in democratization and the modern citizen (a story that is, in many ways, more mythic than real; see e.g. Mann 1993). Today, citizenship is generally understood as an individual’s entitlement to participate in specific aspects of the state’s creation, reinforcement, and maintenance of authority (this participation is what we conventionally call “politics”), practices that also serve to legitimate political rule. The citizen receives protection for herself and her possessions, in return for the obligation to commit her body, property, and taxes to society, represented by the state, during times of national need. But the ever-growing penetration of the public realm by the private has greatly reduced the range of activities in which citizens are expected to act in the name of the public good rather than specific private interests.

Most industrialized countries have done away with the military draft; taxes are seen as an intolerable and unfair burden rather than an obligation to the common weal; public service is increasingly the province of rich individuals and corporate donors; and civic virtue has more to do with signifiers than practices (e.g. showing the flag on national holidays or on the family SUV). The marketization of social relations and privatization of public services have led the duties of the citizen to be valued on a purely pecuniary basis. Military service becomes a means to acquire employment skills; user fees furnish a quantifiable amount of “public” services—often provided by private contractors; political participation involves the inconvenient casting of votes; and civic virtue is measured by (tax-deductible) contributions to schools, voluntary organizations, and charities. Citizenship, in other words, has been transformed from a status connoting political membership in and obligations to society into a form of voluntarism seeking benefits for the self.

This is not all that surprising, given the diminution of the public realm. But how has it happened? The very concept of “citizen” as a contractual relation between the (usually propertied) individual and the sovereign state is not much more than 200 years old, in spite of the fact that the term was not an invention of nineteenth-century nationalists but, rather, an inheritance from ancient Greece. Prior to the emergence of the modern nation-state and the associated concepts and practices of citizenship, most people were literally property, bound to the land via feudal relationships with their lord. As suggested above, changes in the character of political community in Europe from an aristocratic hierarchy under God to a more polyarchic form under the state were paralleled by the gradual transformation of subjects into citizens. This process took several centuries and was closely linked to the rise of capitalism (but, see Halperin 2004).

While it is often assumed that the earliest forms of citizenship were merely political—that is, they encompassed only political rights of membership (Arendt 1958)—citizenship

has always been better understood as integral to an industrializing state's *political economy*. The differentiation of individuals and their interests from the more collective hierarchies of feudalism and its early descendents was central to the rise of liberalism and to the very notion of citizenship as an individualized attribute conferred on a person, rather than an ascriptive characteristic inherited from one's ancestors or arising from physical location. Before the French Revolution, the typical member of political society (*citoyen*) was a propertied gentleman—often of the aristocracy—with an interest in preserving his status and title to property. After the French Revolution, property became less central to the grant of citizenship (as a member of political society), and property in the self became more important (and, eventually, the only requirement, albeit only so long as no other state had a “lien” on a person's body).<sup>9</sup> The delinking of labor from land inherent in the demise of feudalism and the transition to capitalism raised a dilemma for rulers and states alike: What was to bind the now-free individual to the state, if ties to the land no longer kept them hostage?

Locke provided one part of the answer; Hegel, the other. Locke argued that it was private property that “made” the citizen and provided the foundation for civil society (Locke 1988: II 122–4, 138). According to Locke, only the individual who owned property could be considered a full, rational member of the political community. Moreover, since the state existed to preserve property, among other things, only those with property were believed to have an interest in preserving the state (Locke 1988: II 138). Those who put labor into land but lacked title to it, whether peasants, sharecroppers, or squatters, could never be fully rational or full citizens (Locke 1958: para. 252). John Stuart Mill made similar arguments, insisting that it was property that created both wealth and nationhood (Mill 1962:52).

Hegel argued that property was essential to identity. As he put it, property was central to the (re)production of selfhood, and selfhood was key to an individual's social existence. Recognition of the functioning individual rested, therefore, on property (Hegel 1821: sec. 1.1). But property was not a thing for Hegel; rather, it was, as discussed above and as put by Shlomo Avineri (1972:136), a “social attribute” whose possession must be recognized by society and, ultimately, the state. And, argues Avineri, “[S]ince property is basic to Hegel's view of the person, poverty becomes for him not merely the plight of people deprived of their physical needs, but of human beings deprived of their personality and humanity as well.” In the answer to Hegel's concern we see the foundational link between modern citizenship and property. In keeping with its role in creating and legitimizing property rights, only the state was authorized to grant such title to property in the self (as happened, for example, with the abolition of slavery in the United States; Stanley 1998), and only those who met a set of sometimes arcane and complicated criteria were deemed qualified to receive such title free and clear. Nonetheless, in the late nineteenth-century United States, for example, citizenship was, in many instances, a prerequisite for acquiring title to property, on the one hand, and confiscating it from those who held or occupied land under other forms of customary or usufruct title (which was rarely inscribed in documents recognized by the United States or the individual states). By binding certain people to territory via citizenship, and using citizens to lay claims to territory on its behalf, the American state was able to extend its notional sovereignty to parts of the continent in which initially it had no legitimate claim or title other than “Manifest Destiny” (e.g. Texas, California, the Southwest).

Industrialization and enclosure of common lands between the sixteenth and nineteenth centuries, especially in Great Britain, dispossessed many who had never been citizens in any contemporary sense of the word, but who had certainly been members of their communities, albeit with few “human rights” as we conceptualize them today (Polanyi 2001). Contrary to the claims of Garrett Hardin (1968), the “tragedy of the commons” was not ecological but social. Community membership rested heavily on reciprocal bonds of obligation and extensive kinship ties—what anthropologists used to regard as the “customs” of so-called traditional societies. Today, such bonds have acquired new legitimacy and respect under the rubric “social capital” (Putnam 2000), even as this represents another move to transmogrify personal relations into semi-monetized values.<sup>10</sup>

I do not mean to reify or romanticize pre-capitalist social arrangements; kin- and land-based communities were closed, parochial, exclusivist, and often unfriendly to “outsiders.” They were also excluded from the political society of countries, such as that was. Nevertheless, enclosure and the penetration of markets and industry into these communities disrupted long-established social ties and devalued those bonds of reciprocity and obligation so important to the survival of households and communities (Marx and Engels 1964; Berman 1982). As a result, the material base necessary for the survival of these “ur-citizens” went into decline or was stolen outright. Left without livelihoods, people began to leave the countryside and migrate to the cities. (This process is almost identical to that which we see today around the world, most noticeably in less-developed countries; see e.g. Sassen 1994, 1998.) Once in the cities, migrants owned little or nothing, rendering them unqualified for a citizenship defined in terms of possessions. The more fortunate became members of the working class and began to accumulate things, if not actual real property. The less fortunate became members of a disenfranchised lumpenproletariat. In time, these new urban residents became too numerous to ignore. Governments were compelled to acknowledge them as bona fide members of the nation, if only to give them a stake in the defense of the state and to protect itself and its elites from domestic instability and revolution.

Nevertheless, for decades, citizenship, nationality, and political rights were restricted to small numbers, defined in fairly narrow terms—by blood, as in Germany, or language, as in France—and limited to men. In time, these legal requirements were linked less and less to descent, masculinity, or ownership of real property and in their place an often-tacit link to the individual’s property rights in the self, in the form of alienable labor, became the basis for citizenship (Stanley 1998). As testified to by contemporary debates over welfare and employment—debates that can be traced back to Malthus and his contemporaries (Ross 1998)—liberal societies continue to regard those who do not work for a wage as less than full members of the political community, and sometimes impose restrictions on their liberty and rights (e.g. workfare schemes; see also Arendt 1958: ch. 3–4).

Globalization, it is often said, threatens the entitlements of citizenship because of relentless competitive pressures that force governments to make policy choices without public ratification (Brysk and Shafir 2004:3–10; Shafir 2004:11–25). Others argue that, notwithstanding these pressures and a “democratic deficit” at the international level, states are finding it necessary and possible to grant forms of national membership and protect rights of non-citizens, if only to retain their standing in the international system. Yasemin Soysal (1994) is an advocate of this latter view, arguing for a “post-national”

approach to understanding the limits of state sovereignty where rights are concerned. On the one hand, she asserts, national sovereignty has become “celebrated and codified in international conventions and treaties.” On the other hand, the “notion of human rights, as a codification of abstract concepts of personhood, has become a pervasive element of world culture” (ibid.: 7).

In her view, states are counted upon to assert their sovereignty over borders and immigration but, at the same time, they are also expected to observe certain global standards regarding treatment and recognition of the universal rights of those who cross those borders and enter the national space. Soysal (1994:41) explains this apparent contradiction by reference to “new institutionalist approaches in macrosociology [which] contend that world-level rules and definitions are integral to the constitution of national institutions and social entities, such as state policies and bureaucracies, national economies, education, welfare, gender, and the individual...”<sup>11</sup> And, she (Soysal 1994:43–4) continues:

Human rights are now a pervasive feature of global public culture. They are the object of much public debate and social action and organization, enveloping and engendering a wide range of issues.... As such, human rights principles amount to more than formal arrangements and laws. They constitute a binding discourse, according frameworks that render certain actions conceivable and meaningful.... [G]lobal discourse creates new actors and collective interests which, in turn, exert pressure on existing systems. Once codified and materialized through conventions, legal instruments, and recursive deployment, this discourse becomes a focal point for interest-group activities and public attention. It enables mobilization, opens up an array of legitimate claims, and amplifies action.

Yet, in characterizing the discourse of human rights as a social and political phenomenon—which does, of course, have visible *distributive* effects—Soysal manages to disregard the centrality of the human rights discourse in the neoliberal global political economy as well as the origins of human rights in liberalism and its political economy. More to the point, and as I have argued above, *the human rights discourse is as much one of political economy as it is social or political*.<sup>12</sup>

As Bryson and Shafir (2004) note, the origins of human rights in natural law had to do with claims asserted against limits imposed on the emerging European bourgeoisie by the divine laws of God and the divine rights of kings. But it was only through the *legitimation* of such rights that the middle classes were able to protect their property and person from unjust seizure. Moreover, it was only through coalitions with the sovereign, against the landed nobility, that the bourgeoisie was able to obtain acknowledgement of these rights by both sovereign and state. Ultimately, these first rights of property were expanded and extended to encompass today’s panoply of human rights (Lipschutz 2004a). All of these rights, as argued earlier, were and are intended not only as restrictions on the state but also as ways of preventing those with capital and private property from literally (re)appropriating the bodies of the citizens. Human rights can thus also be understood as a form of individual sovereignty exercised within liberal systems and their markets, which frees the consumer citizen from the constraints imposed by

states pursuing national advantage. One's right to purchase an item produced anywhere in the world trumps the state's interest in restricting such choice only to national products (Friedman 1962; Friedman and Friedman 1980). This argument is not meant to suggest that concepts of human rights did not exist prior to the promulgation of the UN Universal Declaration of Human Rights in 1948 or, for that matter, the French Declaration of the Rights of Man and Citizen in 1789. Nor does it mean that human rights are some kind of conspiracy by capital or a liberal imposition on "free" individuals. Rather, human rights—political, social, and economic—are associated with *individuals* living in a liberal market society and are necessary to a fully realized but largely imaginary form of that society. Rights protect the individual against depredations by agents in the market, surely a major element of Polanyi's "stark utopia."

Some observers, such as Stephen Gill, have noted the extent to which "citizenship" has come to be defined by the individual's relationship to the market rather than the political community. Gill points out that wealth is necessary for access to credit, and credit is a prerequisite for citizenship in contemporary liberal democracy. He writes that "[T]he substantive conception of citizenship involves not only a political-legal conception, but also an economic idea. Full citizenship requires not only a claim of political rights and obligations, but access to and participation in a system of production and consumption" (Gill 1995:22). This, he argues, acts to discipline and socialize consumers, beginning in adolescence. Failure to meet the terms of economic citizenship, through late payments or bankruptcy, means social marginalization. The threat of exclusion keeps consumers in line (Lipschutz 2000: ch. 7). The result, Gill says, is the replacement of "traditional forms of discipline associated with the family and the school" by market discipline (Gill 1995:26; see also Drainville 1995). In this way, the worker-consumers of the world are bound into citizenship in the new global economy.

### **Life on the commodity frontier**

The economization of citizenship is taking place in parallel with the privatization of the public "commons." Privatization not only takes the form of the hiving off of certain state functions to the private sector, but also involves the enclosure of public goods and entitlements through imposition of ever-stricter eligibility requirements on those who seek the protection of the state through citizenship and belonging. There are two forms of encroachment into the public realm that are of benefit to private parties. The first is the corporate "code of conduct." Here, the extent of a company's commitment to "social responsibility" is wholly an executive decision, and which rights will be observed, and how, is determined in the board room rather than in the *polis* or the legislature. This is a paradoxical, if not contradictory, outcome, inasmuch as the corporation is acting as an ethical agent in civil society even as it deploys these ethics within a constricted private realm. I shall return to this point below. The second, and more popular, method is what I have earlier called, after Polanyi (2001:74–80), "markets in fictitious commodities." These are based on the creation of private property rights in what were heretofore a public good or commons (Drahos 2003). In both cases, the effect is to reduce or eliminate public decisionmaking authority and to further dilute what is already a rather thin democratic system, at best.

A recent example of enclosure of a commons is the enormous expansion of “intellectual property rights” (Draho 2003). This enclosure is justified in the name of efficiency of allocation and elimination of corruption as well as the “right” of capital to make a reasonable return on investment in bringing goods to markets. Ironically enough, however, such goods are sometimes orchestrated through the expropriation of information about individuals, heretofore regarded as private, and its transformation into proprietary data that become the property of either state or capital, or both. This can be seen in the ways that certain gene lines, taken from plants and people, sometimes with tax-supported funding, are turned into patented drugs. In this instance, the life of the political “citizen,” whose relation to the state was, historically, constituted around certain kinds of public relationships, is now converted into bits of commodified information that can be sold to the highest bidder. In this sense, the citizen has become an economized object—of capital, as it were—and individual membership in what is left of political society is, as suggested by Gill, mediated through private relationships with capital and credit-providing entities. Under these circumstances, constraints on the expropriation of public property by private actors become ever weaker, and it falls largely to individuals to assert their “right,” through the judicial system, to that which has been expropriated.

Consider, for example, the so-called right to privacy. The state has long asserted that no such right exists—an argument reiterated by US Supreme Court Justices Antonin Scalia and Clarence Thomas in the Court’s 2003 decision to overturn Texas’s prohibition of sodomy (US Supreme Court 2003)—and has regularly meddled in affairs that, today, are broadly considered private and personal. Nonetheless, over time, “privacy” has come to be regarded as an individual right that can only be abrogated by the state in situations where there have been violations of individual integrity (e.g. child abuse, torture, etc.), national security, or criminal statute. Nonetheless, privacy is regularly subject to appropriation by capital as a condition of admission to economic citizenship—consider, for example, what details must be revealed in order to obtain a credit card. Moreover, although there are innumerable rules and laws addressing “privacy rights” with respect to personal information and activities, violators have little to fear in the way of punishment and they show it. “Privacy policies” have more to do with the sale of personal information than its sequestration. Capital promises to behave, and duly sends out notices to this effect, but it is clear that such information is rather freely commodified and sold all around. Self-regulation is the name of the game.

As we have seen earlier in this book, producers absorb the costs of the selfregulatory process (or pass them on to consumers) by committing themselves to a set of specified behaviors and practices that, when vetted by the appropriate authority (who may also be private), certify them as “socially responsible.” Adherence to socially responsible behavior is expected to appeal to consumers who, looking for the appropriate certifying mark, are assumed to prefer responsibly produced goods to the alternatives (although who would ever admit to producing or selling “socially irresponsible” products?). The implicit hope of advocates of codes of conduct and corporate social responsibility is that a shift in consumer demand for such goods will lead to a commensurate shift in supply of those virtuous goods (not that this always happens; see Barkin and Mansori 2001), thereby supporting socially responsible practices in markets and eliminating the need for public regulation while simultaneously proving that corporations are capable of ethical behavior. Changes in producer behavior are, in other words, motivated largely by

economic concerns, but the form of regulation is not, in itself, of the market-based type. That is, the producer cannot purchase permits to violate either rights or laws limiting certain rights. Rather, these self-imposed rules foster a form of corporate “civic virtue” or “good citizenship” (CIVICUS 1999).

Here we encounter several problematic contradictions. First, can corporations be “citizens”? Second, can corporations be ethical actors? And, third, *should* corporations be the purveyors of ethical standards? The fact that corporations are individuals only in legal, and not corporeal, terms poses certain difficulties. As we see in the Wal-Mart case, individuals must internalize the company’s code of conduct through “special training sessions” that re-educate them, so to speak, into full awareness of corporate pledges. The individuals themselves need not have any specific ethical or even moral commitment to the code; it is simply a set of standard operating procedures that the employee must follow, much like punching a time clock or limiting bathroom breaks to ten minutes. Indeed, the individual may even feel strongly that the code is a violation of *her* ethics, and willfully ignore it. In other words, unless corporate management is willing to commit adequate resources to enforcement of the code, and to sanction individual violators, the code cannot constitute a set of ethically binding principles as they are commonly understood. And whether such behavior, on the part of both corporation and employee, is a reasonable expectation or a faint hope is addressed in the following chapter.

### **The end of politics as we know it?**

A critical consequence of the economization of rights and membership described here is a pale version of politics, at best. The extent to which an individual can participate in contemporary market society is largely determined by his or her access to resources; as noted earlier, political activity is limited largely to activities that bear a strong resemblance to consumer behavior: voting, contributions, logrolling for a better deal. While the poor are perfectly free to participate in such political activity, their engagement takes place at fairly low rates (Piven and Cloward 2000). The voices of the disadvantaged are heard infrequently, and opportunities to participate in decisionmaking, either directly or otherwise, are limited. Individuals not fortunate enough to be natives of the country in which they live, nor wealthy enough to buy their way in, are denied any legal status that might provide them with access to resources and opportunities offered by the social regulation arising out of political society. By contrast, the well-off are much more able to buy their way to political influence and to bankroll both the candidates and legislation they desire. As Anatole France (1917:87) wrote, “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” The crux of the matter is that money offers results.

As suggested in Chapter 3, most, if not all, of what passes for “politics” these days has to do with the distributive aspects of social life, rather than the use and ends of power. After all, Laswell’s classic definition of politics is “who gets what, when, and how” (1936). In his terms, and as generally understood and practiced, the end of institutionalized politics within a liberal polity is the determination of how much is to be received by each party to a social contract and for what reasons some might be denied a share of the pie. Politics, in this respect, becomes a struggle for entitlements and the

protection of what one already has. The fairness of the distribution comes to be judged, rather simply, on the basis of income and wealth rather than other, more-encompassing considerations. Under these circumstances, the constitutive basis for such decisions remains uninterrogated (Lipschutz 1996: ch. 2), and the “good life” is defined by consumption. Consumption is valued as one’s contribution to the public good, because to consume is to buy, to buy is to contribute to aggregate economic growth, and higher rates of growth lead to higher levels of utility, satisfaction with things as they are, and social stability. Market democracy focuses on increasing the size of the pie, rather than dividing it fairly, but this kind of “politics” ensures that no one complains about the filling. Any notions of justice or equity or even politics are subsumed under the beneficent consequences of growth and trickle-down economics. The means by which such growth takes place, and the power relations embedded within these means, are simply taken for granted as the consequence of the “natural” operation of markets.

Under these circumstances, the expression of politics through the market comes to seem not only rational but natural, too. In return for contributions in money and time, members of civil society organize into and join groups and associations that provide them with goods and services couched in terms of self-interest. Inasmuch as institutionalized politics primarily concerns the allocation of resources, it seems “natural” to utilize the same kinds of tools for purposes of lobbying and influence in pursuit of political objectives. This is certainly the path chosen by corporations and others concerned about the political environment in which they must operate; it is the strategy adopted by many civil society organizations seeking to regulate or restrict behaviors and practices.

The discussions of citizenship and human rights offered in this chapter suggest that political membership has always been very limited and always subject to the discretion of the state. The original “citizens” were concerned primarily with protecting their property, their title to it, and their say in activities that might threaten both. “Popular sovereignty,” or rule by the people, has rarely extended as far as direct democracy, and it has almost always included strong protections for property and the private realm. This is not entirely surprising, inasmuch as the modern state is directly related to the absolutist state and its predecessors, in which both people and property were possessions of the sovereign. While the liberal state incorporates numerous protections for “life, liberty, and property,” it is also within its remit to restrict or even confiscate all three, if it so chooses.

Popular sovereignty is, moreover, a threat to the liberal state. There is a long history of fear that giving the vote to all, no matter what they might own, will lead to the confiscation of the property of the better-off (e.g. Plato 380 BC/1998; Burke 1790/1958). Because most members of any electorate will possess little or no property, goes the argument, they are likely to act to take it away from those who do have it. Hence, the freedom to act politically and collectively is highly constrained, with decisionmaking authority delegated to “responsible” representatives who will protect the interests of the propertied. That such representatives have also become highly dependent on this same class for campaign funds and social support only serves to reinforce the point. Beyond this, the possibilities of leveraging regulatory change through the political system are severely limited by the penetration of the private sphere into the public realm. Well-heeled interest groups and business associations are able to deploy legions of highly paid lobbyists as both inducement and warning to representatives that their (the groups’ and



associations') prerogatives and properties must be respected and protected. The individual exercise of one's political rights seems blocked at every turn (Wolin 1996).

It is not difficult to see how the market then becomes the universal lubricant. Markets are the realm of "freedom." Individuals can choose whatever they want, and no power can prevent such an exercise. The ability to "vote" in the market for the product of one's choosing resembles—and not entirely accidentally—the electoral process, *but with more choices!* Through the Invisible Hand, producer actions can be influenced, with an aggregate social good the outcome. There is no need to seek out like-minded others to organize collectively; individual action can substitute without all the fuss and muss associated with political organization and action. Given, moreover, that there is no global legislature to which aggrieved individuals or groups might communicate their demands for regulation, the market becomes an ersatz remedy for the "democratic deficit" of domestic politics as well as international relations.

What seems evident is that the "problem," however it might be defined, does not lie in making private regulation more "effective," in expanding legal definitions of citizenship and its entitlements, or in calling for more, or more expansive, human rights. Rather, the source of the problem is to be found in the diminution of the public sphere and its subsumption into the realm of the market through privatization of the commons. The implication of this argument, and it is one that is more fully developed in Chapter 8, is that the practitioners of "politics via markets" seek to retrieve a social ethic of respect for human beings (and nature) through offers of rights *by the very parties guilty of violating them*. Here, however, the exposure and elimination of corporate (im)morality through shaming (Keck and Sikkink 1998) does not serve the wider political end, which is to reinstantiate specific social ethics as expressions of the public's vision of the good life as it is reflected in and through the state. Producers, through their violations of human dignity, are effectively appropriating the "property rights in the self of their workers. In a society in which such dignity was offered not in the form of property rights but, rather, as a binding ethic, such violations would not arise.

One could argue, of course, that the "ethic" of utilitarianism through the market does reflect a public vision of the "good life," and that the state is simply acting on that. There is good reason to believe that there is little support for doing away entirely with the market; there is also good reason to believe that there is considerable, albeit unarticulated, concern about the extent to which market morality has come to dominate both public and private life. If the extent of this invasion of the public by the private is as great as suggested here, and merits some form of action, it is incumbent on those who critique the current system to propose realistically what might be that action. This is my task in the last chapter of this book.

### Notes

1 This is not so much a new phenomenon as a recurring one; see Polanyi 2001.

2 Note that I have collapsed the three "generations" of human rights—civil, social, and economic—into two categories linked to production (economic and some social rights) and reproduction (political and some social rights).

3 In this respect, the goals are similar to those articulated by French regulation theory; see Boyer and Saillard 2002; Robles 1994.

- 4 As I will make clear below, these “externalities” actually amount to the illegitimate appropriation of the commons by private actors and, as such, could be thought to constitute a form of theft from the *demos*.
- 5 In the case of intellectual property involving genetic modifications, it is the laboratory research done on the original plant that qualifies as labor put into that which was “waste.”
- 6 Thanks to Hasmet Uluorta for elaborating on this point.
- 7 In discussions of ethnicity and nationalism, as well as modernization theory, these signifiers are often pejoratively called “ascriptive,” in part as a way of illustrating their “traditional” or “primitive” character by comparison with the modern, liberal individual.
- 8 I eschew here the more frequently used term “good” in order to avoid charges of utilitarianism and consequentialism.
- 9 The Congress of Vienna in 1815 and the Concert of Europe represented elite efforts to restrict the expansion of individual rights to those without real property, as seen in the suppression of various revolutions, especially in 1848 and 1871 (Halperin 2004).
- 10 “Social capital” is nothing more than the bonds of mutual obligation of social groups, a practice identified long ago by anthropologists, but generally relegated by economists to the realm of kinship and clan relations. Francis Fukuyama’s *Trust* (1995) is an example of this wheel’s reinvention.
- 11 Contrast this view with the economic constitutionalism of Gill (1995, 2003) and Jayasuriya(2001).
- 12 I use the term “political economy” here as it involves the interplay of state authority and the influence of capital to structure the conditions under which markets and their agents operate. See the discussion in Chapter 8.

## 8

# Bringing politics back in

### Introduction

“What are we to do?” This is, of course, the quintessential question. It assumes there is a problem that must be addressed, and it assumes that we can do something about that problem. In this final chapter, I focus on “do” and all that the verb entails. In Chapter 7, I argued that, while choice in the market has the appearance of “doing,” such activity involves, for the most part, the individual ratification of decisions already made through institutionalized politics and/or the selection among functionally similar if not visually identical products on the ballot or supermarket shelf. The range of choices offered through the market is vast, but those choices are all of a specific character: they are found in an expanding universe of real and fictitious commodities. Not only are alternatives frequently not on offer in the typical marketplace, but the possibility of other forms of social life and political action involving more than choices about what to consume is almost unthinkable. It was no accident when Milton Friedman (1962:15) wrote that “Each man can vote, as it were, for the color of tie he wants and get it....”<sup>1</sup> A simple politics for the simple life.

Still, political life is hardly that simple. We live, today, in a complex and worldgirdling system of global governmentality, one whose center is almost impossible to pinpoint—there is no “there” there—and there is no single place—or even places—that can be identified as the originary source of contemporary global rule. Indeed, the shift of “political authority” from the national to the international level, from *polis* to experts, visible in institutions such as the World Trade Organization and the practices of global governmentality, has been the intended result of the “depoliticization” of the domestic political economies of democratic market societies (e.g. Ruggie 1982). Efforts to create a global public sphere, visible in the mostly market-oriented projects and campaigns of global civil society, have so far done little more than reinforce the “economic constitutionalism” of international affairs (Jayasuriya 2001). It is clear that such projects are neo-liberal in inspiration, organization, and practice—not entirely surprising, given that global governmentality, such as it is, largely mirrors the governmental system of the United States—and rely, for the most part, on market mechanisms to achieve their distributional ends.

To put this another way, global civil society is deeply imbricated with liberal concepts and practices and the rationalization of neo-liberal governmentality, rather than with emancipation through political practice. The creation of what would be, in essence, an international public sphere, as some have proposed (Falk 1995; Strauss 2002), would only, at this point, serve to instantiate an institutionalized politics that would remain as remote from society and its members as are the current activities of most national parliaments. Cosmopolitan citizenship (Held 1995; Hutchings 1999) would be a thin and denatured version of the national archetype, at best. Moreover, it seems unlikely that

human rights would be provided or protected to a much greater degree than they already are today (although there are certainly states where improvement is possible, including the United States). There will be no revolution from above. There is very little that is political “up there,” anyway.

The political practices (or “praxis”) that I imagine and describe here are, consequently, rather different than selecting among neckwear or, for that matter, between candidates for high or higher office. They involve participation in constitutive decisionmaking through struggle and engagement with the “state,” which is not only desirable but integral to political and social life. Moreover, while “democratic” and reasoned conversation and communication, such as that proposed by Jurgen Habermas (1984), are necessary to such political praxis, they are not sufficient, for they seem to envision the end of both the political *and* politics as a result of consensus. I can only concur here with Hannah Arendt, who wrote that “action is the political activity par excellence” (1958:9). The problem we face is in determining what kind of action is political, necessary, and sufficient.

In this final chapter, I propose that praxis and action must involve at least two elements. First, it must be of a “face-to-face” form, but not for reasons having to do merely with place, community, or visions of a recreation of the Athenian *polis*. Rather, face-to-face means, as Arendt put it, “the organization of the people as it arises out of acting and speaking together” (1958:198), whether they are close by or far apart. This notion opens the possibility of political “action at a distance,” as it were, linked together in “epistemes” of social ethics and praxis. As I noted in Chapter 1, epistemes are *not* the same as “epistemic communities” (Ruggie 1975:569–70; Haas 1992b), which are defined as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area” (Haas 1992a: 3). My use of the term “episteme” is, here, drawn from Foucault (1973) by way of John G. Ruggie (1975:569), who defined it as “a dominant way of looking at social reality, a set of shared symbols and references, mutual expectations and a mutual predictability of intention.” I, in turn, define an episteme as a widely dispersed network of groups composed of like-minded participants who are informed and motivated by a shared set of ethics, beliefs, understandings, and practices but who act within a delimited social and political arena. Thus, an episteme bears some resemblance to a transnational “new social movement” but it goes beyond simply peddling new norms, ideas, and instrumentalities (Sikkink 2002).

Second, political action must be oriented toward the instantiation in society of social ethics that must, ultimately, be articulated and implemented *through* the state’s authority to structure the political economy and separate the public and private spheres of liberalism. This is a first step, I believe, toward limiting, and even ending, the authority and autonomy of the market and “re-embedding” economy within society (Polanyi 2001).<sup>2</sup> This, as I hope to make clear below, can only be accomplished through the struggles of social movements with a specific understanding of politics.

To repeat: First, we must recognize that the demarcation between the public and private spheres is also a means whereby political action can be limited and disciplined even as it offers means through which capital can appropriate pieces of the public “commons,” thereby opening new opportunities for accumulation and profit. In limiting political activity to institutionalized practices, such as voting in periodic elections, liberal citizenship is denatured of most of its political potential, and membership in democratic

society comes to be represented by a thin set of property rights in the self and the documents attesting to title (e.g. passport). Only *belonging*—which goes beyond a membership card—in those social groups and movements that provide the tools to critically and constantly analyze and reflect on the political, and its relationship to the state, is able, I believe, to fulfill the promise inherent in a richer notion of social and political life. Second, this awareness must encompass, as well, a recognition of how one has come to be located in a particular place, where place is understood not simply in spatial terms but also relational ones (Lipschutz 1996: ch. 7; Agnew 1993:263; Harvey 2000), and in which these relations are not limited to those who live nearby but those around the world who are also part of epistemes of social ethics and praxis.

These are normative arguments. Face-to-face political action must be driven by ideals and practices that are nevertheless cognizant of what constrains as well as what is possible (Harvey 2000: ch. 10). A more important question, perhaps, is where do we begin and what must we do? It should be clear, by now, that I consider the market to be an inappropriate realm for political action. It is not possible, in and through the market, to engender the structural changes in the contemporary global political economy that can address the social externalities of concern in this book. My reasons for making this assertion and staking out this position are only partly about the “effectiveness” of market-based regulation or “spillover” into society, as discussed in Chapters 4 and 5. What is of greater importance, I believe, is a widespread failure to understand how political community is constituted through the social ethics that bind the community together *and impose obligations on it*. Here, I draw on Hegel’s distinction between *Moralität*, which is individual, subjective morality, and *Sittlichkeit*, the “wider totality of ethical life” (Avineri 1972:137), as well as on my discussion, in Chapter 7, of the transformation of citizenship and rights from a public good, as it were, to a private interest. Politics and action must push back the boundaries of the market and restore to the public commons that which has been taken away.

I begin this chapter with a discussion of “politics” and the “political.” What, precisely, do I mean by the term? Here, I repeat an earlier discussion about the difference between distributive and constitutive politics, and link them to political economy. Although “political economy” has come largely to be used by neoclassical economists to describe the distribution and movement of resources in markets, both domestic and international, I use the term in a more critical fashion, to refer to the ways in which agents can use certain forms of power to shape market environments to their own advantage, primarily through their influence on state representatives, institutions, and practices (Palan 2000; Nitzan and Bichler 2002; Lipschutz 2003:134–42). That is, political economy is not only about capital flows and accumulation, but also about how agents are able to influence and affect, through the authority and capacity of the state, those structural conditions that facilitate accumulation. In this respect, such agents can redraw the boundaries between public and private to their own advantage, thereby also changing distributions of capital and resources.

In the second part of the chapter, I examine the way in which distributive politics is based on morality while constitutive politics rests on social ethics. This distinction is a critical one to my larger argument, for the former relies on “rights” as the mechanism for deciding who is deserving of specific entitlements and deserts on offer in a given political economy. The latter, by contrast, rests on internalization of particular ethical

discourses—composed of beliefs, practices, and consequences<sup>3</sup>—into the “normal” life of a political society, where it becomes binding on that society’s members. Within a state, as I have suggested above, such ethics are embedded within structural constraints that limit the reach of the market; outside of the state, however, there is no way to instantiate social ethics (this is, in part, about the great debate between universalism and particularism)—it is not yet possible. It constitutes the great regulatory dilemma at the core of this book.

In the third part of the chapter, I turn to the question of action: how and where can it happen? Here, I return to the distinction between global civil society and social movements. In Chapters 3 and 7, I linked global civil society (GCS) to neoliberal governmentality, and argued that most of the activities of GCS are focused on distributive matters. That is, the actors of GCS use information, ideals, ideas, and influence in various forms to try to alter the behaviors of states, corporations, and consumers in the attempt to get them to choose to conform to certain norms, principles, and practices (Wapner 1996; Keck and Sikkink 1998; Sikkink 2002). By illustrating, in effect, the short vs. long-term benefit-cost ratios of alternative behaviors, GCS actors presume that their targets will, rationally, be induced to change their consciousness and behaviors. This will alter the distribution of resources, as well, leading to internalization of undesirable impacts. By contrast, I argue, certain types of social movements focus on structural change through the practice of constitutive politics, by means of political action and struggle *with both society and state*. Here, the political is as much in the “doing” as it is in the informing, shaming or arm-twisting. A successful social movement is able to use its productive power, in the Foucauldian sense, to transform discourses and the social ethics of society. This can be a highly perilous pursuit.<sup>4</sup>

I end the chapter and book with a manifesto: a call to political struggle. Unlike Michael Hardt and Antonio Negri (2000) who concluded their majestic *Empire* with a call for communism, or a myriad of other books that seek a return to a Garden in which harmony has replaced conflict (Fukuyama 1992), I do not believe there can be an end to either history or politics. But calls for class struggle, as attractive as they might have once seemed, or for resistance, as romantic as it might appear, do not strike me, in this day and age, as the solution, either (they are necessary, but not sufficient). I prefer here to fall back on David Harvey’s (2000: ch. 9) concept of a “dialectical utopia,” one in which we are motivated to struggle for social change and toward a socially constructed end, yet one that will never be fully realized. There is no *telos* here, only the proposition that political struggle is, in itself, a central element of the “good life.”

### **What is “politics” and what is “political”?**

In order to clarify the arguments I make later in this chapter, it will be helpful to review definitions of “politics” and “political.” The classic definitions of Laswell (1936) and David Easton (1953) are both well known, although these have more to do with the distribution of resources within a market democracy than the constitutional foundations of such systems. That is, constitutions are presumed to be engraved in stone and not open to debate, because that way lies instability and conflict. The basic decisions about principles and means having been decided long ago and authoritatively, all that is left now is the struggle over shares of the economic pie. Charles Lindblom (1977:119) writes

that, “In an untidy process called politics, people who want authority struggle to get it while others try to control those who hold it.” But he does not, in this definition, indicate either the form of authority he has in mind or the means by which it is exercised (in this, his conception of domestic politics is much like Hans Morgenthau’s argument that the end of international relations is the “struggle for power”; Morgenthau 1948). Deborah Stone, one of the more perceptive analysts of market society, never quite defines what politics is, but proposes (1997:7) that

[T]he essence of policymaking in political communities [is]: the struggle over ideas. Ideas are a medium of exchange and a mode of influence even more powerful than money and votes and guns. Shared meanings motivate people to action and meld individual striving into collective action. Ideas are at the center of all political conflict. Policymaking, in turn, is a constant struggle over the criteria for classification, the boundaries of categories, and the definition of ideals that guide the way people behave.

Although Stone sees “shared meanings” as central to collective action, she offers no clues as to where these might originate or how they might be related to political economy. The “struggle over [and for] ideas” thus seems to fall into the category of “build a better mousetrap and they will come.” In this case, however, it is the supply of and demand for ideas that determines who wins (Homer-Dixon 2000).

As a number of writers have observed, neo-liberal globalization has had the somewhat unexpected effect of both marginalizing and constricting the public sphere of the nation-state, such as it is, and has virtually eliminated people’s access to whatever public sphere might be imagined to exist in the international realm (Falk 1995). The same is true within democratic polities. According to Sheldon Wolin, this is more the norm than the exception, for *the political*, he argues (1996:31; emphasis in original),

is an expression of the idea that a free society composed of diversities can nonetheless enjoy moments of commonality when, through public deliberations, collective power is used to promote or protect the well-being of the collectivity. *Politics* refers to the legitimized and public contestation, primarily by organized and unequal social powers, over access to the resources available to the public authorities of the collectivity. Politics is continuous, ceaseless, and endless. In contrast, the political is episodic, rare.

I agree with Wolin that there is not much that is “political” in market democracies today, but I am less sure of his contention that, under constitutional orders, the political must necessarily be infrequent and ephemeral. Nonetheless and given Wolin’s definition of the “political” as a starting point, we may ask: what are the effects of such moments? Are they distributive or constitutive? Are they about fighting over shares of the pie or about debating, deciding on, and *baking* the pie we desire? Curiously, Wolin’s wording—“to promote or protect the well-being of the collectivity”—sounds very much like distributive politics (even governmentality). I think, however, that the term “collective power” reveals something different: that moment in which the *polis* becomes conscious

of itself and *for* itself and is able to act in a constitutive manner, as necessary with or in opposition to other, socially or politically active groups and classes (counter-hegemonic and hegemonic, in Gramscian terms). This bears more than a little resemblance to Marx's admonition regarding the destiny of the working class, although I rather doubt that Wolin sees such an historical *telos* emerging from those political moments.

By contrast with Wolin, I believe *the political* can and should be more ubiquitous and common. The political (aka constitutive politics), in my view, must be more than the distribution of goods or the maximization of utility. It involves the direct participation of people in those social choices having to do with the conditions and making of their own lives, individually and collectively, under institutions and structures that, while heavily constraining, are open to challenge and change. In other words, the political has to do not with the distribution of goods and resources, although that may be an important social objective, but, rather, with the *means* and *ends* of production, reproduction, and distribution: how these means and ends are selected and accomplished, and to what shared purpose.

I also take the political to be central to and heavily implicated in political economy, in the sense that the constitutive rules that govern the organization and operation of markets must be structured by and through the state. The state, in turn, is articulating the ethical choices of *political society* (and *not* civil society in its market sense). This is, of course, a highly idealized conception of the political (and one highly contested, as well; see Huntington 1981). There are no "really existing" democratic systems that tolerate the full version of the political in this sense (and perhaps there have never been any such systems). All contemporary market democracies are highly structured and highly constrained arrangements whose institutional legitimacy is maintained through a few basic modes of action and participation (and why is interest group activity viewed by some as a "threat" to representative democracy while similar corporate activity is not?).

The *demos*, as it were, has scant chance to engage in any kind of direct participation in constitutive politics, to have a say about representative arrangements, or to review and assess the outcomes that result from the actions of their representatives. The very legitimacy of market democracy depends, nonetheless, on the widely held conviction (and evidence) that institutional arrangements are representative, that representation does take place through essentially fair and equitable procedures, and that those who are elected to public office do a fair and impartial job of representing those who did vote, those who did not vote for them, and those who did not vote at all. That these convictions are highly susceptible to challenge is a point, I think, that does not need to be defended.<sup>5</sup>

The disappearance of constitutive politics and the alienation of the *demos* is not entirely accidental. In trumpeting the "end of history," Francis Fukuyama (1992) eagerly anticipated this outcome, one addressed by Daniel Bell (1960) a generation earlier, albeit for the United States rather than the world. As Joe Painter (2000:6) has argued,

Liberalism holds a limited and passive conception of citizenship which provides a minimum set of basic rights to allow each individual self-interestedly to pursue his or her private definitions of the good life. Active participation in the public sphere is discouraged as this would imply an effort to promote a common conception of the good life thereby reducing



the liberty of individuals to pursue their own, perhaps different, conceptions.

Indeed, the very reification of “private” as a sphere distinct from the “public” serves to obscure the extent to which this differentiation manages to depoliticize some very critical matters.<sup>6</sup> Relegating family, civil society, and social movements to the private sphere leads to the conclusion that they have nothing to do with either politics or power in the public sphere, even as the state routinely meddles with them (on the rationale for this, see the dissents by Scalia and Thomas in US Supreme Court 2003) and the political economy depends on them. At the same time, somewhat ironically, efforts by the state or social movements to assert claims in the public sphere are decried as “politics” and “takings” of property. Furthermore, the notion that the market is the better part of the private, rather than somehow imbricated with the public sphere, leads to the illusion that political freedom largely involves an individual’s “freedom to choose,” in the words of Milton and Rose Friedman (1980). While these points are important in the national context, and have constituted the terrain over which the citizenship battles have taken place, they are even more important under conditions of globalization, when the realm of the market is hardly constrained by a public sphere and, indeed, seeks to colonize what little remains of public commons and goods.

### Politics and property

There are, I propose, two matters of concern here: First, under contemporary conditions of neo-liberal globalization, what ought to constitute the public sphere and how ought people to act *politically* within that public sphere? Second, what ought to constitute the *ethical* set of *entitlements* (“ethical” in the Hegelian sense; see p. 205) that is required to address both distributive and social inequities and discriminations related to current individual<sup>7</sup> and group statuses? I take the former to involve questions of action (means) and the latter goals (ends). It is clear that the two inform each other, ends having something to do with the selection of means and means being chosen as paths to particular ends, but how and where to begin is not very evident. In *Justice and the Politics of Difference*, Iris Young (1990:227, quoting Marcuse 1964:7) argues that:

One important purpose of critical normative theory [and speculation] is to offer an alternative vision of social relations which, in the words of Marcuse, “conceptualizes the stuff of which the experienced world consists...with a view to its possibilities, in the light of their actual limitation, suppression, and denial.” Such a positive normative vision can inspire hope and imagination that motivate action for social change. It also provides some of the reflective distance necessary for the criticism of existing social circumstances.

She also (1990:234) argues that “A model of a transformed society must begin from the material structures that are given to us at this time in history....” In a similar, albeit more materialist vein, David Harvey proposes that “The architecture of dialectical utopianism

must be grounded in contingent matrices of existing and already achieved social relations. These comprise political-economic processes, assemblages of technological capacities, and the superstructural features of law, knowledge, political beliefs, and the like” (2000:230–1). In other words, we must understand and work with “really existing” social formations and relations without accepting them as either given or immutable, if we intend to act politically and answer the questions I have posed above.

The struggle to be political must, therefore, begin with two objectives: first, ending the fiction of the separation between public and private as it exists in everyday life, on the ground; second, restoring *constitutive* action to politics and political practices. The first means resisting the penetration of market logic into all realms of human life, for *political* reasons; the second means creating public spheres in which the very uses and purposes of power—especially that of the market—are subject to debate, decision, and change. I am not suggesting here that *everything*, including the personal and sexual, need be exposed to public scrutiny or politicized.<sup>8</sup> I do argue that we must come to recognize the extent to which an intrusive market has already exposed and commodified so much that we regard as personal. It is also important that we recognize that much that is deemed “private,” including civil society and social movements, ought not to be excluded from the public sphere on the grounds that it has nothing to do with the “state” and the political. Only by reasserting the primacy of politics over markets, and interrogating and struggling over the public—private distinction, can we begin to address the problem of social regulation and the joint questions of membership and human rights that are so central to this book.

Here, consequently, I want to bring the discussion back to political economy and the relationship between ethics, property, and power. As I suggested in Chapter 7, liberalism’s concept of human rights emerged out of the move to transform the individual from a sovereign’s subject—that is, the individual’s body as another’s property—to a sovereign subject—that is, one who holds property rights in his or her own body. Although this move might appear economic, to simply assert that human rights are *not* forms of property rights in the self would be to dismiss the relations that constitute liberal society, based as it is on the notion of individual autonomy and contract. That is, the liberal concept of the individual sees economic relations as constituted through contract, which offers the individual the possibility of autonomously breaking that contract (e.g. through quitting a job, getting a divorce, suing for emancipation). As anyone who has tried to escape such contracts is well aware, it is not so easy to sunder such relations if and when they have been constituted through social means.

Moreover, there does exist an *ethical* difference (I think) between title to property in things and the individual’s “title” to property in the self (we no longer accept slavery or indentured servitude as legitimate or thinkable practice, for example, even though they continue to be found in various forms around the world<sup>9</sup>); we call property in the self “rights.” As I have argued earlier, the state then acts as a grantor, guarantor, and guardian of these rights, against not only itself but also encroachments by capital and private interests that would, if unconstrained, simply transform bodies into fictitious commodities to be bought and sold (Polanyi 2001; Lipschutz 2005).

What, precisely, is the state’s role in this regard? If we examine the historical instantiation of specific rights—such as the prohibition on slavery, which transferred title from the slave owner to the freedman—we find them emerging not out of practices in institutionalized politics or markets but through the action of social forces. There was

little in the way of organized opposition to slavery prior to the end of the eighteenth century, in either England or North America, yet by the middle of the nineteenth century it had been abolished in both (Ferguson 2003; Hochschild 2004, 2005). Supporters of slavery and the slave trade were hegemonic and dominated politics and economics at the beginning of this period, and there were extremely strong interests in sustaining slavery. Yet, by 1870, abolition was not only broadly accepted, but it was written into both countries' constitutions (albeit not without a war in the United States). Today, the social ethic against enslavement is so internalized in society and individuals over much of the world that it has become virtually unthinkable. We have a binding obligation to oppose slavery in all its forms.<sup>10</sup> Had abolitionists simply relied on individuals choosing to free their slaves because it was immoral, it seems unlikely that the movement would have been so successful. "Self-regulation" was, quite simply, not a viable strategy (a contrary historical view about the efficacy of self-regulation can be found in Breen 2004, who sees the American Revolution as the first case of consumer activism).

Is self-regulation any more viable today? It is generally thought of as involving management or control of rights and legal violations by the offender, but what it actually amounts to is obedience to a particular conception of *morality* as a means of motivating internalization and a change in behavior. That is, the self-regulating individual agent must consider a particular action or procedure as *immoral* before avoiding it. Generally speaking, arguments on behalf of self-regulation emphasize the immorality of rights violations and the morality of virtuous behavior (see Crisp and Slote 1997, and especially Stocker 1997). The latter is dressed up in the language of reputation and profit, that is, virtuous behavior is rewarded by consumer approval, which also serves the agent's self-interest. Other agents, seeing the benefits that accrue as a result of virtuous behavior, will follow suit (although they are not compelled to do so). Morality, however, is a weak reed upon which to rely for such a result.

Hegel helps to shed light on this problem. As Shlomo Avineri (1972: ch. 7) explains the point, Hegel distinguishes between *Moralität*, which is individual, subjective morality, and *Sittlichkeit*, the

wider totality of ethical life. *Moralität*...regulates the relations among individuals with one another *qua* individuals. But superimposed on this is the broader ethical life of the community [i.e. the State], of people relating to each other not as individuals but as members of a wider community.

Expanding on this, Alejandro Colás (2002:41) points out that,

for Hegel, morality can only become meaningful if it operates within a community, if it is given content through the individual's involvement in public life.... [T]he associative elements of civil society take on not only a representative but an ethical role by integrating individuals into the wider community, recognizing the value of their work and educating them in the virtues of civic life.

Moreover, wrote Hegel (1821:3.3, §258, "Remark"),

If the state is confused with civil society, and if its specific end is laid down as the security and protection of property and personal freedom, then the interest of the individuals as such becomes the ultimate end of their association, and it follows that membership of the state is something optional. But the state's relation to the individual is quite different from this. Since the state is mind objectified, it is only as one of its members that the individual himself has objectivity, genuine individuality, and an ethical life.

Hegel seems not to have been much interested in the sources of this ethical life—whether it originated in the family, civil society, or elsewhere—and only that it must be lived through the political community.

Are codes of conduct and “corporate social responsibility,” then, *Moralität* or *Sittlichkeit*? Let us unpack the concept of CSR. The first thing to note is that it is cast in terms of “responsibility” on the part of an actor, rather than being presented as a binding social obligation on or collective commitment by the members of political society. According to the *American Heritage Dictionary* (Morris 1981:1108), “responsible” is defined as “(1) Legally or ethically accountable for the care or welfare of another; (2) Involving personal accountability or ability to act without guidance or superior authority.” “Responsible” also “implies trustworthy performance of fixed duties and consequent awareness of the penalty for failure to do so.” By contrast, “obligation” (Morris 1981:905) is:

(1) The act of binding oneself by a social, legal, or moral tie. (2a) A duty, contract, promise or any other social, moral, or legal requirement that compels one to follow or avoid a certain course of action, (b) A course of action imposed by law, society, or conscience by which one is bound or restricted. Obligation [also] applies to a specific instance of constraint in which the constraining factors are immediate and objectively defined (as by terms of a contract or treaty).

Under the terms of the liberal “social contract,” one is obliged to adhere to social ethics, especially once they are articulated through law, and many of the rights of concern discussed in this book are, indeed, encoded in domestic and international law. The “responsible” individual is assumed to recognize this requirement and behave accordingly, and a failure to observe applicable law may lead to arrest, trial, and incarceration. Of course, many violations of the law go undetected, as casual observation will confirm. In the context of social responsibility, however, adoption and observance of a code of conduct is a *voluntary* and *private* act: there is no public requirement for an actor either to adopt such a code or to adhere to its terms. The “responsible” corporation recognizes that violations of such a code may reflect badly on its brand reputation, should its malfeasance become public knowledge (in a few instances, the result may even be corporate bankruptcy and dissolution, as in the case of Enron). But unless a public authority chooses to link such violations to existing laws and to prosecute the violator, the corporation will suffer no public penalty. In other words, the “responsible” corporation is not obligated to observe even its own code and it does so only out of moral

considerations and economic interest. Because corporations are loath to see codes enacted into binding law for fear of the restrictions this might involve, they do not want to become participants in those social movements that seek to make social ethics compulsory and binding.

At the same time, moreover, it is not at all evident that corporations *should* be agents of ethical standards and practices. According to Hegel, Gramsci, and others, the social ethics that are foundational to beliefs and practices in capitalist social formations originate within civil society. Here, once again, we run into the perennial question of whether actors in the market, that is, corporations, should be considered part of “civil society.” The tradition of Ferguson, Smith, and Marx says yes: the first two claiming that it is the realm of “freedom”; the last, because that is where capital and the bourgeoisie operate and control the mode of production. But this traditional position brings us back to an earlier question: how and why are the public and the private differentiated? For Marx (Marx and Engels 1970), the morals governing society clearly arise out of the desires and needs of capital (and the bourgeoisie), and the public sphere is, in any event, largely at their service. For Ferguson (1767/1995) and Smith (1859), society’s morals are religious ones whose source is transcendent and, consequently, open neither to debate or change. Business men will meet and plot, of course, and to expect otherwise is naïve, if not foolish (Smith 1776). There is a place for public prevention of collusion and monopoly but, for Smith, in particular, these are matters not of morality, but of efficiency.

Recall Colás’s argument that civil society is the setting from which social movements and political activism originate and that “civil society has historically found expression in two predominant forms—one linked to the private sphere of the capitalist market, the other to the struggles against the all-encroaching power of the state” (2002:47). Although it is tempting to think of the “all-encroaching power of the state” as manifested in the territorial monopoly of legitimate violence, it is the state’s power to shape the political economy of markets and expand the realm of private property in favor of capital that is “all-encroaching” today and is the focus of ethical challenges by social movements. To put this point another way, corporations can be *morally* responsible but they do so out of self-interest; they have no motivation to allow jurisdiction over their moral principles to derive from outside of their individual economic space.<sup>11</sup> Only ethical responsibility is also *socially* responsible, and this is the opposite of “enclosure of the commons,” involving, in effect, the restoration of property and rights to the public commons, where they are protected by a state whose authority is based on recognition by political, and not market, society. It now becomes clear why corporations and capital are so fearful of public regulation. Not only do they see it as a “taking” of property through restrictions on their individual freedom to accumulate (the distributive effect), but they also recognize the state’s absolute authority to redefine property rights under conditions over which they may have little or no control (the constitutive effect). Self-regulation, at least, poses no such threat, and might come to be seen by civil society as an acceptable (if illusory) substitute.

### Ethics and power

The centrality of social ethics to political praxis, as well as the reasons for my emphasis on the distinction between public and private, might not be immediately evident. To clarify these points, we must return to a consideration of power and governmentality. As a general rule, scholars of political science have focused on two forms of power, direct and institutional. Direct power is generally the focus of realism in international relations and influence in comparative politics, that is, the ability of A to make B do something that B does not want to do (Dahl 1957:202–3). Institutional power is the realm of neo-liberalism in IR and institutionalism in comparative politics, that is, the formulation of “principles, norms, rules and decisionmaking procedures” (Krasner 1983:2) which actors follow, even if they do not necessarily want to, because they come to recognize that it is in their self-interest to do so. These two forms of power do not, however, exhaust the types that are important to politics. Drawing on recent work by Barnett and Duvall (2005), two other forms of power, which are often collapsed into the first two, can be defined: “structural” and “productive” (aka “discursive”). These latter two forms of power are as critical as the first two to the constitution not only of the political but also of states, markets, society, and even individuals.

Table 8.1 offers a typology of power along two axes: the type of authority—either distributive or constitutive; and the type of agency—sovereign or social. Note that none of these categories says anything about the specific nature of the agent imbricated with a particular form of power—it can be an individual, a corporation, a group, a state. What matters here is the *arena* in which power is exercised—the household, the group, the company, society, state system—and the *purpose* of power—distributive or constitutive. In terms of political economy, in particular, the state (notionally) possesses the sovereign authority to structure social life and to make the kinds of constitutional decisions that organize and legitimate institutions, such as the market and civil society.<sup>12</sup> These are, as discussed in Chapter 3, the “rules defining the game” and, in theory, at least, only the state can make or alter those rules. Institutions constitute the “games” themselves, which are played in specific arenas by actors meeting certain eligibility requirements occupying specific roles established through particular contractual relationships. The state generally has the authority to ensure that the rules of institutions are obeyed and to punish those who violate those rules (as when it sends corporate executives to jail). Whether the state actually does this depends on whose interests are being served by particular institutional configurations and how that authority is exercised. More to the point, institutional agents may have the ability (if not the authority) to intervene in the rule-making process in ways that structure those rules to their advantage. This is the conventional goal of lobbyists and interest groups.

Table 8.1 Types of power

	<i>Sovereign action or agency</i>	<i>Social action or agency</i>
<i>Authority to divide, distribute, expropriate</i>	<i>Direct power: force, coercion, manipulation, influence</i>	<i>Institutional power: agenda-setting, law-making, rolesetting, administration</i>
<i>Authority to define, decree, decide</i>	<i>Structural power: regulation, constitution, ethics</i>	<i>Productive power: language, habitus, structuration</i>

Source: Adapted from Barnett and Duvall (2005: ch. 1).

What is “productive” power? As Foucault (1980:119) famously wrote,

If power were never anything but repressive, if it never did anything but say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network that runs through the whole social body, much more than as a negative instance whose function is repression.

More precisely, it is this type of power, articulated through the structures of language, that “produces” the subject through the roles, rules, and relationships that, in turn, constitute the social institutions within which subjects are produced. As Jennifer Bonham (2005) explains,

The individual is not a “natural” being imposed upon by relations of power and knowledge. Rather, the very fact that we can think of ourselves as individuals is the outcome of these relations. Further, it is through the production of knowledge about bodies that different identities are “objectively” attached to different bodies. As identities are pressed upon and taken up by human beings, they regulate themselves more or less effectively in relation to those identities.

And Foucault (2003c: 136) again:

Take, for example, an educational institution: the disposal of its space, the meticulous regulations that govern its internal life, the different activities that are organized there, the diverse persons who live there or meet one another, each with his own function, his well-defined character—all these things constitute a block of capacity-communication—power.

It is not force or compulsion that has produced me as a professor of politics (although I do admit to a certain degree of compulsiveness and fear); rather, it is my active engagement with a specific set of norms (progress, enlightenment) and practices

(teaching, research) located within a particular institutional arrangement (university, discipline) that has as its result “professor of politics.” This could not have happened outside of the particular productive network of higher education characteristic of the United States or in the absence of my agency within the constraints of that network.

This agency still seems highly limited. Is there no way to break out of that discipline? In a discussion of “The Subject and Power,” Foucault suggests that, “in order to understand what power relations are about, perhaps we should investigate the forms of resistance and attempts made to dissociate these relations.” He then describes (2003c: 129) a set of “transversal struggles...that are not limited to one country.”

These are “immediate” struggles for two reasons. In such struggles, people criticize instances of power that are the closest to them, those which exercise their action on individuals. They look not for the “chief enemy” but for the immediate enemy. Nor do they expect to find a solution to their problem at a future date (that is, liberations, revolutions, end of class struggle). In comparison with a theoretical scale of explanations or a revolutionary order that polarizes the historian, they are anarchistic struggles.

Continues Foucault (2003c: 129), “they attack everything that separates the individual, breaks his links with others, splits up community life, forces the individual back on himself, and ties him to his own identity in a constraining way.” These are struggles whose “targets...are power effects...; they are struggles against the ‘government of individualization’” (2003c: 129). Finally, “if it is true that at the heart of power relations and as a permanent condition of their existence there is an insubordination and a certain essential obstinacy on the part of the principles of freedom, then there is no relationship of power without the means of escape or possible flight” (2003c:142). Plotting this “escape or possible flight” is not, however, a simple matter: “[o]ne should not imagine that one can escape from relations of power all at once, globally, massively, by a sort of radical rupture or by a flight without return” (Foucault 2001, cited in Chaloupka 2003:73). What is required is *strategy* (Foucault 2003c:142–4). I will return to this point shortly.

“Productive” power is thus difficult to identify and locate, but it is rooted in the language and ethics that construct and organize social life, individual and collective identities, and belonging in a political community. That is, productive power emerges through both discourse *and* action which achieve their effect through changes in both institutions and structures. In the case of the former, this means changing the distributional rules of social institutions, but doing so from within those institutions. The latter, by contrast, involves efforts to change the constitutive structures that frame and shape the environments within which institutions, such as corporations, operate. This distinction parallels Colás’s two forms of civil society (2002:47). Market-oriented civil society groups seek to change actor behavior through appeal to moral principles within the context of existing institutions: less pollution, more resources to the poor, greater adherence to rights. Political movements, by contrast, struggle against the structural power of the state as expressed through the encroachments of the private into the public. Through their efforts to instantiate social ethics into the body politic, they also strive to



effect changes through the state's structural power. This is the essence of political struggle, in that it seeks to alter the organization of the political economy so as to weaken the ability of capital to appropriate from the public realm.

To what, then, does this all add up? Structural power articulated through the state reflects not only the conventional "balance of social forces" within a society—both directly and institutionally—but it also then flows through the "capillaries of social life" instantiating a discursive sense of how things should be ("common sense"). Although there are always contradictions present in the social and material organization of a society, as they intensify these contradictions tend to affect this discursive sense. That tension can ultimately become the basis for social organizations and movements seeking to resolve the contradictions through political praxis. By contrast, as suggested above, civil society organizations focus, for the most part, on institutions and the practices associated with them, by trying to exert direct influence and negotiating within those institutions (hence, consumer boycotts of offending companies and codes of conduct). But the structural frameworks within which these institutions function enable, rather than constrain, the practices of concern, that is, they do not articulate the ethical practices and limits that movements demand, society expects, and states have agreed to (e.g. human and other rights). It is only through changes in the *constitutive* rules that such demands can be transformed into social ethics to which agents are bound and which serve to constrain them. And those changes can come only through constitutive politics, through political praxis, directed at and mediated through the state.

One problem with this formulation is immediately apparent: the most visible and accessible type of engagement with the state involves precisely those politics that are most subject to direct influence. Moreover, that type of politics is, in itself, *institutional*: one votes, one lobbies, one contributes. And, in market democracies, money generally wins in the institutional arena. The struggle for constitutive change must, therefore, focus on productive and structural power, and the relationship between the two. There is a way in which "discourse ethics" and "communicative action" (Habermas 1984) do link together these two forms of power, although Habermas finds both virtue and solution in the authority of reasonbased conversation. Thus, he seems to assume, any conflict over a "moral" problem can be resolved through reasoned discussion, so long as there is full and free participation and consensus (this is, of course, a poorly articulated summation of a complex argument). Through this process, the discursive community arrives at a shared, and presumably new or different, norm to which the community commits itself. Or, as Habermas (1995:117–18) puts it,

Under the pragmatic presuppositions of an inclusive and noncoercive rational discourse among free and equal participants, everyone is required to take the perspective of everyone else, and thus project herself into the understandings of self and world of all others; from this interlocking of perspectives there emerges an ideally extended we-perspective from which all can test in common whether they wish to make a controversial norm the basis of their shared practice; and this should include mutual criticism of the appropriateness of the languages in terms of which situations and needs are interpreted. In the course of successfully taken

abstractions, the core of generalizable interests can then emerge step by step.<sup>13</sup>

This new or different “norm” is thus embedded within the more general set of constitutive principles governing social and political life which, under liberalism, is instantiated through the state. What we see in Habermas’s formula is the exercise of discursive power, through language and logic, to induce the state to muster its structural power. Habermas has been criticized for, among other things, assuming the possibility of “free and equal participants” and ignoring the hegemony inherent in the concept of an “extended we-perspective” (e.g. Benhabib and Dallmayr 1990). Moreover, any commitment that results from such communication appears to arise purely out of “rational discourse,” which does not require any action. His argument, nevertheless, remains essentially valid: structural power inhering in the state can be reconfigured through productive power articulated by political society.

What Habermas’s communicative ethics does seem to lack, however, is the sense of *doing*. Communicative ethics is very orderly and civilized—it must be, apparently, in order to avoid totalitarianism—but it is also rather passive and, relying on reason (and self-interest), resembles consciousness-raising. It has the character of a kind of civilized legislative politics, in which honorable individuals (gentlemen, mostly) debate issues and reach agreement on public policies. Such conflict and struggle as occurs is limited to verbal sparring, and then the game is over. In other words, there are *rules* governing the process, but who decided on those rules? Moreover, there is no apparent obligation to follow through on the commitment, either, except to protect the reputation of the individual. Here, it would seem, we have reached a dead end, for two reasons. First, the recent history of discussion, debate, and discourse, as evidenced in, for example, the economic constitutionalism of the WTO, has not provided much in the way of room for the kind of communicative ethics so valued by Habermas and others. Second, it seems apparent that there are few institutionalized channels through which this process can happen.

What does this configuration look like in simple terms? The apparel industry consists of institutions within institutions: individual factories located in national political economies, linked to transnational corporations based in specific (“home”) states but operating in global markets. The factories are material installations that operate under rules and procedures specified by the state in which they are located (“host”), the contracting corporation, and the “international economic constitution.” Factory owners must find ways of reconciling the contradictory rules and demands of these different institutional arenas, and their task is greatly eased if the host government does not strongly enforce structural (ethical) restrictions on rights violations. In any event, the range of social forces and contending interests in any host state, domestic and foreign, is such that there are few, if any, incentives to alter the rules of the game so as to disadvantage capital. The state could, of course, try to instantiate new structural rules addressing human rights, and attempt to enforce them through its structural and police power, but this would risk alienating capital and causing it to move elsewhere. Activists try to get corporations and owners to change the rules of the game within the factory walls, by appeals to self-interest and through efforts to exercise direct power via consumers. But that is as far as things go.

And this begins to explain why social ethics and political praxis are not to be exercised through an ever-greater proliferation of international civil society and nongovernmental organizations. Through the American model of institutional politics, based on the deployment of money and lobbyists and “education” of the population, many CSOs and NGOs have adopted corporation-like forms and behaviors. When the media report on national or international social and environmental matters, it is to these NGOs that they go for comment. When governments feel pressured to include environmentalists in national delegations or on investigative or regulatory commissions, it is from these NGOs that individuals are seconded. And when legislatures formulate and debate laws intended to address environmental problems, it is these NGOs who provide the legal expertise and testimony in support of or in opposition to the legislation under debate. They seek to participate in policymaking as full-fledged “stakeholders.” They search for operating revenues through various types of projects supported by a broad range of funders, including both government agencies and private corporations. Many have even gone into business for themselves, selling services, newsletters, magazines, television shows, T-shirts, mugs, and shopping bags. They differ from those they criticize only in regard to “what is to be done,” and rarely in regard to “what must not be done any longer.” Their participation in “global social politics” has become routine, bureaucratic. They have become part of the very structure of neo-liberal governmentality that is the source of the problems they purport to address.

### **Action**

In a recently published volume (Magnusson and Shaw 2003) on activist struggles to defend forests in and around Clayoquot Sound, in British Columbia, Canada, William Chaloupka addresses the question of strategy. He writes that “ethics alone does not a strategy make” (2003:68) and that, “When we strategize, we bring the normative into contact with the pragmatic” (2003:71). According to Chaloupka (2003:69),

Every movement based on civil disobedience (or other forms of ethical protest) must confront the gap between the moralism of protest’s justifications and the strategies such protest must usually deploy when it interacts with the political world, which is contingent and multileveled.

Strategy is exercised by all actors as they seek to achieve their ends; it involves the exercise of power, but not simply the power to influence or coerce. Instead, it is the power that emerges through doing those things that are naturalized discursively and normally. In the case of timber companies, for example,

They are engaged in (more or less effective and thus challengeable) strategies of maintaining their power to continue their operations as they see fit. They wish to appear inevitable, and the notion that their prerogative is a question of property rights abets this wish.

(Chaloupka 2003:77)

And, continues Chaloupka, “the moral power associated with protests against logging is not ‘possessed’ or owned on the basis of righteous analysis. *That authority has to be created in action*” (2003:77; emphasis added).

Although Hannah Arendt might not seem a likely complement to Foucault (or Chaloupka), she had much to say, in fact, about politics, “productive” power, and action that is germane to this discussion. Writing about “Action” in *The Human Condition*, Arendt (1958:29) noted that

What first undermines and then kills political communities is loss of power and final impotence; and power cannot be stored up and kept in reserve for emergencies, like the instruments of violence, but exists only in its actualization.... Power is actualized only where word and deed are not parted company, where words are not empty and deeds not brutal, where words are not used to veil intentions but to disclose realities, and deeds are not used to violate and destroy but to establish relations and create new realities.

Where can such politics take place? In the “space of appearance,” according to Arendt (1958:30), which

comes into being wherever men are together in the manner of speech and action, and therefore predates and precedes all formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized.

For Arendt, politics could take place only through the *polis*, as it had been constituted in ancient Greece and, especially, Athens. Here, however, she points out (1958:30–1) that

[t]he *polis*, properly speaking, is not the city-state in its physical location; it is the organization of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be.... [A]ction and speech create a space between the participants which can find its proper location almost any time and anywhere.

I find this particular conception of the *polis* is an interesting and provocative one, for it suggests that place is a helpful but not an essential concomitant to politics, action, and praxis. I shall return to this point later, but first we have to consider how politics, in the space of appearance, can create an alternative to governmentality that does not serve to reproduce the relations of power that constitute both it and the political subject.

How can we know what democratic politics is if we have never participated in it? How can we comprehend what is missing from our “democratic” systems if we have not experienced democratic politics? And how can we challenge the marketization of politics if our only concern is about the monetary cost of decisionmaking rather than the disposition of power in politics? Within an Arendtian space of appearance, democracy becomes possible in a form that is radically different from that diluted representational

and economic form we take as normal. Engaging in political action in such a space is, perhaps, the most important step in challenging governmentality. Through action, not only do we recognize just how limited are our representative democracies, but we also produce political power that can be mobilized to transform the state, as it is articulated through the networks that run *through* the whole social body (Foucault 1980:119) and even *into* the body of the social individual (the state begins in the self, as it were).

On the one hand, then, power “produces” the subject, in the governmental sense, but the subject that is produced is not as standardized as the parameters of governmentality might suggest. We are not mere social automatons. On the other hand, the diffusion of power does allow for what might be thought of as discursive ruptures or discontinuities in the web of governmentality. These are small ruptures and are hardly noticeable, at best, but they represent zones of agency, autonomy, resistance, and struggle within which forms of political action can take place (Lipschutz 2003: ch. 6). Such zones might involve “unauthorized” activities focused on the environment or the mobilization of the weak or mass demonstrations that drive presidents from office. Whether peaceful or violent, political action in such zones serves to expose the contradictions inherent in the increasingly dense web of global governmentality. Whether political action can change or overturn governmentality is much less clear. Perhaps new webs can be spun within these ruptures, webs that are ethically deontological rather than consequentialist, that is, political in the sense of praxis rather than utilitarian and focused primarily on distributive outcomes.

The image of a “web” of governmentality is only a very crude metaphor, but it begins to suggest something about power: it must be exercised within the microspaces and capillaries of contemporary social life, and it must be a politics in which not only Habermasian discussion but also social action is possible. Finally, it must seek, ultimately, to see its ethics instantiated, through structural power, within the state and the political economy. Politics, in the sense I mean it here, has to grow out of some form of face-to-face praxis, not because place is central (as many environmentalists have argued; see Lipschutz 1996: ch. 7, 8) but because a democratic politics—one involving the *demoi*—seems to be transformed into governmental management when larger scales and numbers are involved. And politics must involve *action*, for it is only then that power becomes productive and politics becomes meaningful (Mouffe 2000). This suggests a rather different conception of democracy than that commonly held, one that is based in practice rather than platitudes, one whose apotheosis is not the vote but debate and action, as it were. It also points to the state as the focus of struggle, albeit not the contemporary Lockean state that we know, love, and detest.

### Praxis

What, then, is the “praxis” form of productive power? How can it be brought to run back up through those networks to manifest itself as structural power? And how can the parochialism of a spatially bounded politics of territory, and the reproduction of the worst features of the state, at ever-smaller scales, be avoided (Lipschutz 1996)? Here, I construct an argument along three lines. First, a politics of productive power must be based on “face-to-face” interaction, that is, within a social, not territorial, group. That is

to say, the group must be constituted through social relations between members, and not based on property relations. Second, such a politics must also involve action, inasmuch as a mere communicative consensus does not, by itself, motivate anyone to follow through on a commitment (hence the weakness of Internet politics). Finally, these “sources of productive power” cannot operate as isolated molecules, in disregard of others; they must be linked, epistemically,<sup>14</sup> to other similar groups through ethics, networks, and action. It is this shared vision, differentiated on the basis of specific and contingent strategic conditions and needs, that constitutes the episteme. As we shall see, moreover, it is this last requirement that rescues politics from the threat of parochialism and insularity that dogs philosophies such as communitarianism.

To put this another way, the key to the forms of constitutive politics I have in mind rests on action through which social individuals, acting together, can realize a degree of collective sovereignty, and can do so in full awareness that other groups are acting in like fashion in other places and spaces. In this way, people both engender and experience what a democratic politics is meant to be, and they learn how the political has gone missing from neo-liberal governmentality. Without meaning to glorify or idealize contemporary social movements—and recognizing that there are those that seek to severely limit the political realm by commanding obedience to a natural or immanent authority<sup>15</sup>—these are the sites that are, for the moment, the most political. It is these groups and movements that come closest to creating and acting in “spaces of appearance.”

There is a second important aspect of this sense of the political, which has to do with strengthening our intellectual and epistemic sense of how we, as social individuals, are situated locally in various kinds of relationships with others. We experience and try to comprehend conditions, things, and events where we are physically situated, but it is essential to remain aware and sensitive to the history, forces, and action that have played roles in our individual and social lives (Scott 1992; Agnew 1993). It might be helpful here to give an explicit example of such a center of productive power (“real-life” cases can be found in Lipschutz with Mayer 1996; Lipschutz 2003:163–8). While the following example is an imagined one, it follows a general pattern.

The setting is a smallish city that has grown up along a mid-sized river that flows out of a nearby mountain range. The city has gone through an industrial phase and is now also home to a mid-sized university. The river has, over the years, played a number of economic and aesthetic roles in the area: food source, recreational area, small-scale transport, waste dump. There are, of course, public agencies whose responsibilities for the river extend to pollution control, land use, and species diversity, but they are resource-constrained, staff-limited, and regarded with some hostility and disdain by local residents.

Taking a leaf from groups in other places, one resident decides to establish a watershed group to protect and clean up the river. Her motivation does not spring from her brow like Athena from Zeus but rather is the result of many years of social interactions with others both inside and outside of her city. She is aware that there are numerous like-minded individuals living in the city, loosely associated by virtue of normative beliefs and values as well as periodic social interactions in small and large groups. These people also have a commitment to the area that goes beyond pure rational calculation and self-interested behavior; it is an emotional bond to both place and people

that rests on experience and meaning. Our agent approaches several of those acquaintances whom she believes will be receptive to the idea of a watershed group, and proposes that they spend the next four weekends cleaning a stretch of the river's banks. These individuals, linked into an episteme by their general commitment to nature and watershed protection, agree to participate in the project, even though they will receive no direct economic benefit from the work. They, in turn, tell others of the project so that, by the time the third Saturday arrives, several hundred people are participating in the cleanup.

There is no authoritative or official stamp of approval on this activity. No municipal agency has sponsored it; no local business is paying for refreshments; no NGO has publicized it. In fact, some people oppose the project because it involves what they believe is a violation of *their* property rights. Staff members of the local water quality agency criticize the group because it has not followed proper administrative regulations and procedures. A few city council members view the group with some trepidation, fearing that it could become a nucleus of municipal political activity opposed to their development policies. Business people are concerned that one result will be further regulation that will impinge on their profits (this is especially true for one operation that has been surreptitiously dumping its wastes into the river). What happens next depends very much on political struggle within the community and through the various social and epistemic networks constituted by productive networks.

In other places, I have written in some detail about watershed organizations (e.g. Lipschutz with Mayer 1996; Lipschutz 1998). While these organizations look very much like ordinary CSOs and NGOs (and many are), seeking to solve problems through standardized techniques and practices, they possess both democratic and subversive potential. Almost unheard of in 1980, by 2000 watershed groups had become ubiquitous. Focused on a single stream or river, they nonetheless share an epistemic vision of the discursive place of watersheds in both the local and global environment. Individual groups hold to the view that their creek, their stream, their river is central to where they live and merits more attention and care than is being given to it, wherever in the world that watershed might be. At the same time, each group recognizes that its creek, stream, or river is different, in terms of political culture, economy, geography, and meaning.

States, in all their manifestations, have not been insensitive to local concerns about watersheds, especially insofar as they are required by law to clean them up and keep them clean. Nor have responsible administrative agencies been blind to the role local groups can play in furthering governmental goals. Consequently, in many places "official" state-sanctioned watershed projects have been launched while, in others, independent groups have been given a role to play as "stakeholders" in official programs (Lipschutz 1996: ch. 4). But those state agencies tasked with water-related responsibilities are not entirely comfortable with these independent groups, which often tend to be more radical, less manageable, more impulsive, and less systematic than bureaucrats and technocrats would like. They ignore or even trample on property rights. They have no respect for the legal niceties and procedures of the regulatory process. They do not pay adequate attention to scientific principles and evidence. Such activism is often criticized for being "political," especially when it appears to transgress on technical or managerial matters. It is criticized for avoiding the vote, defying the law, disrupting normalcy.

*Political* is code for an unauthorized practice that creates local ruptures in governmentality even as it also generates praxis and productive power. It shows people *what* is possible, and *how* it can be done. Local face-to-face politics, whether it is focused on the watershed, the urban neighborhood, the disempowered, the oppressed, or the occupied, is not only about the pursuit of shared interests, as collective action theorists generally describe it (Olson 1965), or the mobilization of resources, as some social movement theorists would have it (Tarrow 1998). It is also about *productive* power, about means as well as ends. *People decide and act*. They discover how power functions and how it constrains yet enables action and, as they act, they assert their political sovereignty and are transformed into sovereign subjects by their action.

Examples of such politics can be multiplied manifold, and they are not just manifestations of “friendly, ultra-liberal” towns, such as those one might find along the Northern California coast. Among them are neighborhood associations, environmental justice groups, educational collectives, low-income housing advocates, watershed associations, AIDS activists, renewable energy activists, and, yes, even national liberation and resistance movements. Not all such politics are progressive, nor are they all non-violent, especially if we take at face value Foucault’s dictum that “politics is the continuation of war by other means” (Foucault 1980:61). But better political praxis than war or governmentality.

These are not, to be sure, matters of Great Power politics or International Relations as it is commonly defined (e.g. Morgenthau 1948; Waltz 1979). Political praxis is best seen as taking place through the networks and capillaries of society, where there is the real possibility of political community through which productive power can be exercised. Such activity represents a form of the political that institutionalized politics—voting, lobbying, e-mailing representatives—never offers and which is entirely absent from international forums (loci of the famed “democratic deficit”). Constitutive politics in the microspaces embodies an experience that illuminates the possibilities of the political in all of its raw, elemental form. It is conflictual, disruptive, aggravating but, in terms of praxis, productive. It is not a “solution” to a problem; rather, it is a means of defining the problems to be solved and engaging with those things that ought not to be, but are.

### **Bringing politics back in**

I began this book with a focus on the economic; I end it with a focus on the political. Throughout, I have been concerned with political economy. Eliminating the externalities, the infringements, the violations of human rights that are imposed on people and nature in the name of capitalism and economic growth is not merely a matter of “getting the prices right” or “getting the balance right.” Neither solution would, or could, address the ways in which power shapes the political economy or the ways in which the political economy constructs power. Contesting the structure of the global neo-liberal political economy requires political struggle; it requires *bringing politics back in*. This is no easy task; it will be no easy task; it is a task that will never, can never, be simple or completed. Yet, if we seek greater justice, both locally and globally, it is a task that we cannot refuse. I do not pretend to think that books or manifestos such as you hold in your hands can



make much difference in this struggle. All they can do, perhaps, is to point the way. As for the rest, it is up to us to become political and to act.

### Notes

- 1 And, he continues, the buyer “does not have to see what color the majority wants and then, if he is in the minority, submit.” A Nation of One!
- 2 It might be worth noting that, insofar as I see the liberal state-market-civil society complex as a single social formation, “re-embedding” is not possible in Polanyi’s sense. That would require a non-liberal complex, such as communism or fascism, among other possibilities.
- 3 My understanding of “discourse” differs somewhat from the norm (e.g. Hall 1995). In order to validate itself, a discourse must be more than a self-referential set of interlocking statements; it must also be confirmed by the outcomes it generates. This means that a discourse must also prescribe certain policies or practices, which then result in specified material outcomes. The materiality of the discourse confirms, in turn, the “truths” articulated in its constitutive statements and reproduced through associated practices. The beliefs articulated in a discourse are both ontological and methodological: they make statements about the nature of reality and explain how to contend with that reality. These means, or practices, serve to create and maintain the material manifestations of the discourse.
- 4 Moreover, there is nothing in this concept that necessarily implies a “progressive” slant to the goals of a specific social movement; see e.g. Buss and Herman 2003.
- 5 Such legitimacy was sorely put to the test in the US Presidential election in 2000. Whatever one’s political convictions might be, it is difficult to claim that the nine Supreme Court justices are “representative” in a commonly understood sense.
- 6 Arendt (1958) elided this problem by arguing that the “social,” based on the extension of the household model to virtually all aspects of public and private life, had rendered the distinction moot. But Arendt’s analysis, while rather convoluted and written from the perspective of the 1950s, remains one of the best fusions of political theory and political economy available today.
- 7 By which I mean the “social individual” whose identity and selfhood are, at least in part, generated through social relations; see Lipschutz 2001b: 332; Tétreault and Lipschutz 2005: ch. 2.
- 8 I take the notion that “the personal is political” to mean that our individual and collective identities are constituted through social relations, which are political, and not that our every individual proclivity or practice is the stuff of politics.
- 9 There is good reason that, during the nineteenth century, working for wages was often called “wage slavery”; see Stanley 1998. C.B. Macpherson’s (1962) account of the debates over the “personhood” of workers is also of interest here.
- 10 Even so, there are places in the world where slavery still exists, despite its illegal status, which indicates something about the relationship between social ethics and law.
- 11 As Ellen Wood points out, privatization is, in effect, a state’s grant of political authority over property to a non-public party (1995, 2002).
- 12 Admittedly, the extent of the state’s “sovereign” authority in both regards is fiercely debated; see e.g. Barkin 1998; Krasner 1999. As these are ideal categories, the issue of sovereignty can be put aside for the moment.
- 13 This perspective is also reflected in what is called “intersectionality” (e.g. Crenshaw 1991).
- 14 Recalling that this is not the same as Haas’s “epistemic community.”
- 15 I have in mind here deep ecology, Christian Right, and Muslim *jihadi* movements, although they are obviously quite different in terms of their sources of transcendent authority (Lipschutz 2003: ch. 2; Buss and Herman 2003; Lubeck and Lipschutz 2005).

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